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No. _____

In The Supreme Court Of The United States

BETTY MITCHELL, Warden,

Petitioner,

v.

WILEY DAVIS, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does federal law "clearly establish" that a state court trial judge must affirmatively instruct jurors that they need not be unanimous in finding that a particular mitigating circumstance exists in order for a given juror to consider that mitigating circumstance during the weighing of aggravating circumstances against mitigating circumstances?

2. Does federal law "clearly establish" that a state court trial judge must specifically explain to jurors that they are not required to unanimously reject a death sentence before considering a lesser sentence?

3. Does federal law "clearly establish" that a trial judge must specifically charge the jury to the effect that any single juror can prevent the imposition of the death penalty simply by refusing to sign the death verdict, and can do so for any reason or for no reason?

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of the Warden of the Mansfield Correctional Institution in Mansfield, Ohio, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, reported at 318 F.3d 682 (6th Cir. 2003), is attached as Appendix A. The Sixth Circuit's decision denying the Warden's petition for rehearing is attached as Appendix B. The opinion of the United States District Court for the Northern District of Ohio, reported at 100 F. Supp.2d 607 (N.D. Ohio 2000), denying Davis's petition for a writ of habeas corpus is attached as Appendix C. The Ohio Supreme Court's published decision on direct appeal, reported at 76 Ohio St.3d 107 (1996), is attached as Appendix D.

JURISDICTION

The United States Court of Appeals issued its opinion on February 4, 2003, and denied the Warden's petition for rehearing on April 25, 2003. This petition for Writ of Certiorari follows within ninety days. The Warden has timely filed his petition and invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) (2003).

RELEVANT STATUTORY PROVISIONS

Section 2254(d) of Title 28 of the United States Code provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Ohio Revised Code, Title 29, Section 2929.03(D)(2) provides, in pertinent part:

> Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this

section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced [life imprisonment without parole, life with parole eligibility after serving twenty-five years, or life imprisonment with parole eligibility after serving thirty years].

INTRODUCTION

This case would allow the Court to provide desperately needed guidance on an important and frequently recurring question of capital habeas jurisprudence—namely, the extent to which the Constitution requires a state trial judge to instruct capital jurors on jury unanimity in sentencing. Of course, issues surrounding jury unanimity in capital sentencing arise every time that a trial court charges a capital jury. Yet the lower courts are sharply divided, both on what the Constitution requires regarding unanimity instructions, and on the appropriate role of federal courts in reviewing state court capital sentences predicated on allegedly improper unanimity instructions. This case presents an ideal vehicle for addressing these issues.

The panel majority below, relying on an idiosyncratic interpretation of this Court's precedent, determined that it is "clearly established" that state judges must *affirmatively instruct* jurors (1) that they need not unanimously reject the death penalty before considering a life sentence; (2) that the jury need not unanimously find a particular mitigating circumstance exists in order for a given juror to include consideration of that circumstance during the weighing of aggravating and mitigating circumstances; and (3) that the jurors need not unanimously conclude that the aggravating circumstances do not outweigh the mitigating circumstances in order to reject a death sentence. It thus overturned the capital sentence in this case, not based on any error in what the trial court *said* about unanimity, but rather because the panel believed that the state judge was constitutionally required to say *more*.

The panel majority's novel interpretation of this Court's decisions as affirmatively requiring such instructions represents an unprecedented and intrusive expansion of federal court oversight of state court jury instructions.

Moreover, it creates a direct conflict among the circuits with regard to these now-mandated (at least in the Sixth Circuit) instructions. Perhaps equally troubling, the panel majority's decision calls into question the validity of virtually every previously imposed Ohio death sentence. This Court should not allow the lower court here to use an erroneous interpretation of this Court's precedent to justify such a frontal assault on State sovereignty.

It was precisely this State sovereignty that Congress sought to protect through the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d). That statute, which governs Davis's petition here, permits a federal court to grant habeas relief *only if* the state court decision was "contrary to" or "an unreasonable application of" clearly established federal law. Prior to the panel majority's decision here, however, none of the federal circuits to consider the issue had determined that this Court's precedent "clearly established" that the Eighth Amendment requires a state trial judge to affirmatively make these instructions. In fact, directly contradicting the panel majority's decision below, a number of circuits, addressing nearly identical arguments, have concluded that not only is the right to such instructions not "clearly established," but that the Eighth Amendment does not require such instructions *at all*.

This conflict creates a disturbing inconsistency in capital sentencing. Because of the panel majority's decision, the Eighth Amendment now requires protections in the Sixth Circuit that are not required in any other circuit. To ensure the constitutionally required uniform treatment of capital defendants, however, the Eighth Amendment must provide the same protections on habeas review in Des Moines as it does in Dayton. Because of the frequency with which nearly identical jury instructions are given in capital sentencing proceedings across the nation, and because a capital

defendant's constitutional protections have become dependent on the "luck" of geography, this conflict among the circuits is not merely academic.

In addition to the inter-circuit conflict, this decision also exposes a direct intra-circuit conflict on these issues; a conflict that has not gone unnoticed by the district courts in the Sixth Circuit. Although the panel majority's decision was delivered less than six months ago, at least two district court decisions have already expressed concern over the intra-circuit conflict. *See, e.g., Taylor v. Mitchell*, Case No. 1:01CV601, 2003 U.S. Dist. Lexis 4383 at *56-65 (N.D. Ohio March 3, 2003) (attached as Appendix G); *Henderson v. Collins*, Case No. C-1-94-106 (S.D. Ohio July 10, 2003) (attached as Appendix F). The Warden recognizes that, generally, the proper method of resolving a split of authority within the Circuit would be for the lower court to convene *en banc*. Here, however, the circuit court has proven unwilling to do so—the Warden requested *en banc* review here, and the court declined.

While in most circumstances even an unresolved intra-circuit conflict would not warrant certiorari, given the heightened need for uniformity in this area of law, it provides additional support for review here. This Court has repeatedly warned against state capital sentencing schemes that are arbitrary or capricious. Indeed, some 20 years ago, Ohio changed its statute precisely to avoid such concerns. Here, however, the federal court system, the very institution designed to serve as a watchdog against arbitrariness, in fact runs the risk of creating inconsistency. Given the irreconcilable decisions within the circuit, identical cases may result in completely different results. Accordingly, the Warden respectfully requests this Court to grant certiorari on this important issue of capital habeas jurisprudence and resolve the conflict among (and within) the circuits by defining the proper scope of the Eighth Amendment here.

STATEMENT OF THE CASE

Early in the morning of November 26, 1991, Wiley Davis kidnapped Amy Perkins, the wife of a popular Cleveland radio personality, from a downtown parking lot. He robbed her at gunpoint, forced her to remove all of her clothes and brutally raped her. A short time later, Davis shot Amy Perkins in the head while stopped at an intersection and tossed her naked body out of the car. Witnesses saw Davis struggling to close the car door, and then noticed Ms. Perkins lying nude in the bushes nearby, unconscious and barely alive. Amy Perkins died that morning in the hospital.

Davis was indicted and tried on two counts of aggravated murder under Ohio Revised Code ("R.C.") 2903.01(A) and (B), as well as separate counts of kidnapping, rape, aggravated robbery and having a weapon while under a disability. Appx., pp. 74a-75a. At the close of trial, the judge instructed the jury that "the procedure which you must follow in arriving at your verdict in the sentencing phase of the trial is set forth in Revised Code Section 2929.03 of the Revised Code of the State of Ohio." *Id.* at 105a. The trial judge then explained how that statute operated:

> [Y]ou, the trial jury, must consider all of the relevant evidence raised at trial, the testimony, other evidence, the unsworn statement of the defendant, Wiley Davis, Jr., and the arguments of counsel, and you must determine whether the aggravating circumstances which the defendant, Wiley Davis, Jr., was found guilty of committing, are sufficient to outweigh any mitigating factor or factors you find that are present in this case.

> If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances which Wiley Davis, Jr. was found guilty of committing outwe[illegible] the mitigating factors, if any, then you mu[illegible] return such finding to the Court.
>
> *****
>
> On the other hand, if after considering all of the relevant evidence raised at trial, the testimony, other evidence, the unsworn statement of Wiley Davis, Jr. and the arguments of counsel, you find that the State of Ohio failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant, Wiley Davis, Jr., was found guilty of committing, outweigh the mitigating factors, then you will return your verdict reflecting your decision; that is, you must find that the State has failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant was found guilty of committing outweigh the mitigating factors.
>
> In this event you will then proceed to determine which of the two possible life imprisonment sentences to recommend to the Court.

Id. at 105a-106a.

After deliberating, the jury convicted Davis of all counts listed in the indictment and recommended death

sentences for the two aggravated murder counts. *Id.* at 75a. Acting on the jury's recommendation, the trial court sentenced Davis to death. *Id.*

In his direct appeal, Davis attacked his conviction on the grounds that the trial court improperly gave the jury an "acquittal-first" instruction, *i.e.*, that the trial court informed the jury that it could consider other sentencing options only after first unanimously deciding against recommending the death penalty. *Id.* at 85a-86a. Rejecting this argument, the Ohio Supreme Court reasoned that the trial court's instructions, when read as a whole, adequately informed the jury of the proper manner to deliberate and choose a penalty. *Id.* at 87a. The Ohio Supreme Court unanimously affirmed the lower court's judgment and upheld Davis's death sentence. *Id.* at 95a.

After unsuccessfully petitioning the state courts for post-conviction relief, Davis filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio. *Id.* at 33a. Agreeing with the Ohio Supreme Court's analysis, the district court noted that the jury instructions "made clear that any single juror could prevent a death penalty recommendation." *Id.* at 64a-65a. Specifically, "the court informed the jury that all twelve jurors must agree that the aggravating circumstances outweigh the mitigating circumstances before recommending that Davis get the death penalty." *Id.* at 65a. Moreover, the district court found that this instruction "when coupled with the court's admonition that no juror should surrender her individual conscience and good judgment during deliberations, ensured that the jury understood the proper manner of reaching its penalty recommendation." *Id. See also* Appx., pp. 107a-108a. After considering each of Davis's arguments in support of federal habeas relief, the District Court determined that under the AEDPA standard

"Davis fail[ed] to demonstrate his right to a writ of habeas corpus;" and, accordingly denied Davis's petition. *Id.* at 69a.

Thereafter, the Sixth Circuit granted a certificate of appealability on four of Davis's claims, one of which was his claim that the trial court's instructions prevented jurors from giving effect to mitigation. *Id.* at 3a. In a split decision, the panel reversed the lower court and vacated the death sentence that the Ohio trial court had imposed. It did so solely based on its conclusion that the challenged jury instructions were constitutionally invalid. According to the panel majority:

> [i]n sum, the silence in these instructions on the lack of unanimity required for mitigating circumstances, the improper "acquittal-first" instruction, and the unqualified instruction, "Now, as you know...the law requires that in order for you to reach a decision all 12 of you must be in agreement"—would have led a reasonable jury to apply an unconstitutional standard of unanimity at all stages in the deliberative process.

Davis v. Mitchell, 318 F.3d 682, 690 (6th Cir. 2003). The panel majority then determined that since the instruction required "that a jury must first unanimously reject the death penalty before it can consider a life sentence" it "preclude[d] the individual juror from giving effect to mitigating evidence" and, thus, violated the Eighth Amendment. *Id.* at 689.

In dissent, Judge Boggs began by noting that the panel majority's opinion attacked "three parts of the instruction process: (1) what it calls an 'acquittal-first' instruction; (2) the failure to give an explicit instruction that unanimity is not required for any individual juror to find a mitigating factor; and (3) the giving of a standard instruction

that the return of a formal verdict requires jury unanimity." *Id.* at 691 (Boggs, J., dissenting). Criticizing the panel majority's findings, however, Judge Boggs noted that "[e]ach of these three aspects of the instructions is unexceptionable, and the action of the Ohio Supreme Court in upholding these instructions certainly does not constitute an unreasonable application of any clearly established precedent of the United States Supreme Court." *Id.*

With regard to the "acquittal-first" instruction, Judge Boggs explained that the panel majority's "objection to 'acquittal-first' instructions is not to the order of consideration, but to the possibility that a juror may be led to believe that the jury must first unanimously reject death before considering a life sentence, rather than allowing a single juror to prevent a death sentence by creating a deadlock." *Id.* at 692. Judge Boggs reminded the panel majority, however, that "the Constitution does not forbid a jury from considering a death sentence before considering a life sentence." *Id.*

Judge Boggs similarly disputed the panel majority's second finding—that *Mills v. Maryland*, 483 U.S. 367 (1988), requires an explicit instruction that unanimity is not required for any individual juror to find a mitigating factor. After comparing the jury instructions in *Mills* to those here, Judge Boggs noted that the unacceptable scenario presented in *Mills* is "a far cry from the situation presented in this case." *Davis*, 318 F.3d at 694. In sum, Judge Boggs explained that while *Mills* and *McKoy v. North Carolina* require that jury instructions must not "'prevent the jury from considering . . . any mitigating factor that the jury does not unanimously find . . .,' [n]owhere [do they] state that silence in instructions on the lack of a unanimity requirement for mitigating circumstances violates the Eighth Amendment." *Id.* at 695 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 435 (1990)).

With respect to the panel majority's third objection—"that the verdict forms reflected a unanimity requirement in finding that the aggravating do not outweigh the mitigating circumstances"—Judge Boggs chastised the panel majority for apparently converting a state law requirement into a ground for federal habeas relief. *Id.* at 696. Pointing out that "[i]t is difficult to say what the court's argument is at all," Judge Boggs conceded that "Ohio requires its trial courts to instruct juries that one juror has the ability to block the death penalty." *Id.* "However," Judge Boggs explained, "that is a matter of state law, not federal law," and, therefore, constitutes an insufficient ground for federal habeas relief. *Id.* In his conclusion, Judge Boggs lucidly illustrates his difficulties with the panel majority's opinion:

> As nearly as I can gather, the court's complaint is that the judge did not instruct the jury to the effect that "any one of you can prevent the imposition of the death penalty on this defendant, simply by refusing to sign the death verdict. You can do so for any reason or for no reason." While that is a correct statement of existential truth, no case, and certainly no Supreme Court case, has come close to requiring that such an instruction be given.

Id. Recognizing that the panel majority's decision had created an intra-circuit conflict, Warden Mitchell requested rehearing *en banc*. The court denied that request on April 25, 2003.

Warden Mitchell now asks this Court to grant certiorari and to reverse the panel majority's decision, thereby alleviating the considerable confusion it has already caused.

REASONS FOR GRANTING THE WRIT

I. With Its Decision Below, The Panel Majority Created A Conflict—Both Among The Federal Circuits And Within The Sixth Circuit—Regarding The Extent To Which A Judge Must Instruct The Jury On Unanimity In The Capital Sentencing Process.

A. The circuit courts are in conflict over whether this Court's decisions "clearly establish" that a State trial judge must expressly instruct the jury that each juror is free to consider a given mitigating factor regardless of whether the jurors unanimously agree that the factor is present.

It is well-settled law that a State cannot require jurors during capital sentencing deliberations to consider only those mitigating factors that the jury unanimously finds are present. *See Mills*, 486 U.S. at 374-375; *McKoy*, 494 U.S. at 435. The panel majority's decision below, however, went far beyond this commonsense proposition. It found that, *as a matter of "clearly established" constitutional law*, a state trial court judge is required to *affirmatively instruct* the jurors that they need not be unanimous in finding and considering mitigating factors. In so doing, the Sixth Circuit created a direct conflict among the circuits regarding the need for such an instruction.

In *Mills*, this Court struck down a death sentence imposed under Maryland's capital punishment scheme because the jury instructions might have precluded the jury from considering mitigating evidence unless the jury agreed unanimously on each mitigating factor. 486 U.S. at 384.

There, the statute required the jury to collectively write either "yes" or "no" next to each mitigating factor. The Court was concerned that, "in attempting to complete the verdict form as instructed, the jury may well have thought that they were precluded from considering any mitigating evidence unless all [twelve] jurors agreed on the existence of a particular mitigating circumstance." *Id.* That is, the Court was concerned that the verdict form would affirmatively mislead the jury about the need for unanimity. Similarly, in *McKoy*, this Court found unconstitutional any requirement that "prevents the jury from considering, in deciding whether to impose the death penalty, any mitigating factor that the jury does not unanimously find." 494 U.S. at 435.

The panel majority below claimed that the jury instructions here violated *Mills* and *McKoy*—not because the trial judge affirmatively misled the jury, but rather because "the jury was never told, either expressly or impliedly, that individual jurors may consider mitigating circumstances in the weighing process regardless of the lack of agreement with other jurors as to the presence of that factor." *Davis*, 318 F.3d at 689-690. That is, the court below located in this Court's precedent not only an obligation to avoid misleading the jury, but also an obligation in all cases to *expressly instruct* the jurors that they need not be unanimous in finding mitigating factors. In other words, according to the court below, silence on unanimity is not golden.

In adopting this novel reading of *Mills* and *McKoy*, the panel majority created a direct conflict with its sister circuits on the need to affirmatively instruct jurors on the interplay between unanimity and mitigating factors. The Tenth Circuit, for instance, in sharp contrast to the decision below, recently reaffirmed that "a trial court need *not* . . . expressly instruct a capital sentencing jury that unanimity is not required before each juror can consider a particular mitigating circumstance." *LaFevers v. Gibson*, 182 F.3d

705, 719 (10th Cir. 1999) (quoting *Duvall v. Reynolds*, 139 F.3d 768, 791 (10th Cir. 1998)) (emphasis added).

In *LaFevers*, the state court had expressly instructed on the need for unanimity in finding aggravating circumstances, but was silent with regard to whether such unanimity was also necessary for mitigating circumstances. The defendant argued that the failure to instruct one way or the other "erroneously implied that the jury was required to find a mitigating factor unanimously before each juror could consider the mitigating circumstance in determining whether to impose the death penalty," and thus violated *Mills;* a claim nearly identical to that advanced by the defendant below. *Id.* at 719. The Tenth Circuit, however, rejected that claim. It admitted that the jury instructions there "required the jury to 'determine,' 'decide,' and 'find' whether mitigating circumstances existed without any reference to unanimity." *Id.* But it found that this silence on unanimity did not violate *Mills* because the silence did not "impose[] an express or implied unanimity requirement on the jury's consideration of mitigating evidence." *Id.* In short, the Tenth Circuit and the panel majority below directly disagree on the effect of silence with regard to unanimity on mitigating circumstances.

Agreeing with the Tenth Circuit, a number of other circuits have found no constitutional violation where a state trial judge instructs on unanimity as to aggravating circumstances, but remains silent as to unanimity with regard to mitigating circumstances. The Third Circuit, for example, determined that jury instructions nearly identical to those here did not violate *Mills* since "[n]either the court nor the verdict sheet stated that the jury must unanimously find the existence of particular mitigating circumstances or that the jury could weigh only those circumstances which it found

unanimously."[1] *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 307-308 (3d Cir. 1991). The court concluded that although the instructions, like those here, required that the jury "unanimously agree that the aggravating must outweigh the mitigating, [that] is not the same as unanimously agreeing that a mitigating factor exists." *Id.* at 308. As such, the Court determined that the instructions did not violate *Mills*; a result directly contrary to the panel majority's below.

Likewise, in *Powell v. Bowersox*, the Eighth Circuit determined that the following jury instruction did not violate *Mills*: "If you unanimously find that one or more mitigating circumstances exists sufficient to outweigh the aggravating circumstances found by you to exist, then . . . you must return a verdict fixing defendant's punishment at imprisonment for life." 112 F.3d 966, 970 (8th Cir. 1997). In *Powell*, the court noted that the "challenged instructions deal with balancing mitigating circumstances against aggravating factors, not with determining what mitigating circumstances exist." *Id.* at 971. The court concluded, therefore, that since no reasonable juror "could have interpreted the word 'unanimously' in such a way as to bestow upon each member of the jury an unconstitutional veto power over the consideration of mitigating evidence," the jury instructions did not run afoul of *Mills*. If anything,

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[1] In *Zettlemoyer*, the jury instructions stated: "The verdict, of course, must be unanimous. Again, if you find unanimously, beyond a reasonable doubt, the aggravating circumstance that I have mentioned...that is an aggravating circumstance. If you find that aggravating circumstance and find no mitigating circumstances or if you find that the aggravating circumstance which I mentioned to you outweighs any mitigating circumstance you find, your verdict must be the death penalty. If, on the other hand, you find that the Commonwealth has not proven an aggravating circumstance beyond a reasonable doubt or if they have, that the mitigating circumstances outweight (sic) the aggravating circumstances, then you must bring in a verdict of life imprisonment." *Zettlemoyer*, 923 F.2d at 307.

however, the challenged instruction in *Powell* created a much greater implication of the need for unanimity on mitigating circumstances than the Ohio jury instructions challenged below. Thus, in deciding that the instruction there was constitutionally valid, the Eighth Circuit, like the Third and Tenth above, necessarily adopted a position directly contrary to that advanced by the panel below.

In fact, even the case the panel majority cites to support its new requirement, *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997), actually refutes it. There, the court expressly noted that "the absence of such express statement [as to mitigating circumstances] is not dispositive." *Id.* at 925 n.5. *See also Arnold v. Evatt*, 113 F.3d 1352, 1363 (4th Cir. 1997) (no *Mills* violation where trial court instructed jury that it must unanimously find the existence of aggravating factors because instructions never required jury to find any mitigating factor unanimously); *James v. Whitley*, 926 F.2d 1433, 1448-1449 (5th Cir. 1991) (similar jury instructions found not to violate *Mills*); *Gacy v. Welborn*, 994 F.2d 305, 307-308 (7th Cir. 1993) (no substantial possibility that jury was misled into believing unanimity required when judge failed to explain statutory provision that death penalty could not be imposed if even one juror found mitigating circumstances outweighed aggravating circumstances); *Parsons v. Galetka*, 57 F. Supp.2d 1151, 1182 (D. Utah 1999).

Before the Sixth Circuit's decision below, neither this Court, nor any of Sixth Circuit's sister circuits, required trial courts to affirmatively instruct jurors that they need not unanimously find that a given mitigating factor exists. The Ohio Supreme Court's decision, therefore, could hardly be considered "contrary to" or "an unreasonable application of" this Court's decision in *Mills*. The panel majority's conclusion to the contrary has created conflict among the circuits on an issue of critical importance to the capital

sentencing process.[2] This issue, if left unresolved, will continue to create confusion with regard to the jury charge in every capital trial. Because of the frequency with which this issue will arise, and because the Eighth Amendment should establish a uniform constitutional baseline, the Warden respectfully requests this Court to grant certiorari and resolve the conflict among the circuits by reversing the decision below.

B. The decision below creates a conflict among the circuits regarding whether or not this Court's precedent clearly establishes that a state trial judge must instruct the jury that it need not unanimously reject death before considering a lesser penalty.

The panel majority's decision below has also created an additional circuit conflict regarding what *Mills* requires. According to the majority below, *Mills* clearly establishes that a judge must "inform[] the jurors that a life verdict can be rendered by a jury that has not first unanimously rejected the death penalty." *Davis*, 318 F.3d at 689. This conclusion,

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[2] The panel majority has also created a direct conflict within the Sixth Circuit. At least five other Sixth Circuit panels have expressly concluded that a state court trial judge is not required to affirmatively instruct jurors that they need not unanimously find mitigating circumstances. *See, e.g., Kordenbrock v. Scroggy*, 919 F.2d 1091, 1120 (6th Cir. 1990) (*en banc*) (finding no constitutional violation where a trial court instructs the jury that it must be unanimous in finding an aggravating factor, while remaining silent as to the lack of a unanimity requirement for finding mitigating circumstances); *Roe v. Baker*, 316 F.3d 557, 564 (6th Cir. 2002) (nearly identical unanimity instructions as those below do not violate the Constitution); *Scott v. Mitchell*, 209 F.3d 854, 876 (6th Cir. 2000) (same); *Abdur'Rahman v. Bell*, 226 F.3d 696, 712 (6th Cir. 2000) (same). As described in Section II below, review is appropriate on this basis alone because of the heightened need for uniformity in this area of the law.

however, in addition to resting on a misreading of *Mills*, conflicts with decisions in at least three other circuits.

As noted above, here the trial court instructed the jurors (1) that if the jury unanimously agreed on a death sentence, it should return that verdict, and (2) that if it found "that the State of Ohio failed to prove beyond a reasonable doubt that the aggravating circumstances . . . outweigh the mitigating factors, then you will return your verdict reflecting your decision," and that (3) "[in the latter] event you will then proceed to determine which of the two possible life imprisonment sentences to recommend to the Court." *Id.* at 685. As the dissent notes, the majority's objection to these instructions "is not to the order of consideration, but to the possibility that a juror may be led to believe that the jury must first unanimously reject death before considering a life sentence, rather than allowing a single juror to prevent a death sentence by creating deadlock." *Id.* at 692 (Boggs, J., dissenting). That is, the instructions tell the jury what to do if the jury is unanimous (either pro or con) in its decision on a capital sentence, but do not tell the jury what to do in the event it does not reach a unanimous decision on a death sentence.

According to the majority below, this failure to instruct on what to do if unanimity is lacking violates *Mills*. *Id.* at 689-690. The panel majority's decision, therefore, mandates an additional jury instruction in all future capital trials in the Sixth Circuit; one that affirmatively explains how the jury should proceed in the event it does not unanimously agree on a death sentence.

This Court, however, has expressly held that judges are *not* constitutionally required to instruct the jury as to the effect of failing to unanimously reach a verdict. *Jones v. United States*, 527 U.S. 373, 382 (1999). Noting that it has never suggested "that the Eighth Amendment requires a jury

to be instructed as to the consequences of a breakdown in the deliberative process," this Court chastised such instructions as encouraging deadlock and undermining the strong governmental interest in unanimous verdicts. *Id.* By finding that *Mills does* require such an instruction, the panel majority's decision below directly contradicts this Court's reasoning in *Jones*.

Moreover, the panel majority created a conflict among the circuits regarding whether a trial judge is constitutionally required to instruct the jury as to the consequences of a lack of unanimity. After an exhaustive review, the Warden was unable to uncover even one opinion consistent with the panel majority's finding that *Mills* requires a trial judge to instruct the jury that it need not unanimously agree to reject death before considering a lesser sentence. Beyond the fact that none of its sister circuits has extended *Mills* in this manner, as a general matter, a number of federal circuits have concluded that a trial judge is *not* constitutionally required to instruct the jury as to its options should it fail to unanimously reject the death penalty. For instance, reviewing a jury instruction nearly identical to the one below,[3] the Third Circuit concluded that the trial judge was not constitutionally required to "instruct the jury that, in the event it could not unanimously agree that the death penalty should be imposed, the court would impose a life sentence." *Zettlemoyer*, 923 F.2d at 309.

Likewise, the Eleventh Circuit determined that "because of the general interest the criminal justice system has in unanimous verdicts," the trial court "is not required to instruct the jury on the consequences of the jury's inability to reach a unanimous verdict." *United States v. Chandler*, 996 F.2d 1073, 1089 (11th Cir. 1993). Citing this Court's *Jones* decision, the Fourth Circuit similarly concluded that "the

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[3] *See* note 1, *supra*, for a description of these jury instructions.

lack of an instruction regarding the consequences of a deadlock was not unconstitutionally coercive." *Lyons v. Lee*, 316 F.3d 528, 535 n.8 (4th Cir. 2003). *See also Alexander v. Johnson*, 211 F.3d 895, 897 n.5 (5th Cir. 2000). With its decision, therefore, the panel majority not only created a circuit conflict regarding whether *Mills* "clearly establishes" the trial court to render such an instruction, but it also created a conflict on the separate issue of whether there is any such constitutional requirement *at all*.

The panel decision below also creates a conflict within the Sixth Circuit itself. In direct conflict with the decision below, three other panels have held that a judge is not constitutionally required to inform the jury as to "the consequences of a failure to achieve unanimity" in reaching a verdict. *Coe v. Bell*, 161 F.3d 320, 339-340 (6th Cir. 1998); *Buell v. Mitchell*, 274 F.3d 337, 357 (6th Cir. 2001) (rejecting "a constitutional unanimity requirement or a requirement of a jury instruction as to the consequences of a breakdown in the deliberative process"); *Roe*, 316 F.3d at 564 (same); *Henderson v. Collins*, 262 F.3d 615, 621-622 (6th Cir. 2001); *Scott*, 209 F.3d at 873-876. The panel majority decision below, however, squarely contradicts these prior panel opinions, *see Davis*, 318 F.3d at 692 (Boggs. J., dissenting), and instead sides with dicta from yet another Sixth Circuit opinion. *See Mapes v. Coyle*, 171 F.3d 408, 416 (6th Cir. 1999) (suggesting that an acquittal-first instruction violates the Eighth and Fourteenth amendment, but ultimately concluding that the claim was procedurally defaulted). As discussed below (*see* Section II), this intra-circuit conflict further supports the need for certiorari here.

In short, the panel majority's conclusion—that *Mills* clearly established that the Constitution requires a jury instruction reminding jurors of their "options" should they fail to unanimously reject the death sentence—has created two separate circuit conflicts: (1) whether *Mills* clearly

established such an instruction; and (2) whether such an instruction is constitutionally required at all. Because this issue will resurface in every capital trial, the Warden respectfully requests this Court to grant certiorari and resolve the open questions regarding the meaning of *Mills*.

C. The panel majority's decision creates a conflict among the circuits, as well as a conflict within the Sixth Circuit, regarding whether federal law "clearly establishes" that trial judges are required to affirmatively instruct juries that one juror has the ability to block a death sentence, and that they can do so for any reason or no reason.

The panel majority's third, and final, complaint is that "the unqualified instruction, 'Now as you know . . . the law requires that in order for you to reach a decision all 12 of you must be in agreement' would have led a reasonable jury to apply an unconstitutional standard of unanimity" at the sentencing phase. *Davis*, 318 F.3d at 690. In striking Davis's sentence on these grounds, however, the court below created yet another equally troublesome conflict among the circuits.

The conflict is perhaps best illustrated by comparing the Sixth Circuit's treatment of the jury instruction here with the Third Circuit's review of nearly identical jury instructions in *Zettlemoyer*, 923 F.2d at 307-308.[4] In direct contrast to the panel majority below, the *Zettlemoyer* court concluded

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[4] In *Zettlemoyer*, the jury instructions called for a sentence of death if jurors "unanimously agree and find beyond a reasonable doubt that there is an aggravating circumstances (sic) and either no mitigating circumstance or that the aggravating circumstance outweighs any mitigating circumstances." *Id.* *See also*, note 1, *supra*.

that informing the jury that it "must unanimously agree that the aggravating must outweigh the mitigating is not the same as [requiring it] unanimously agree[] that a mitigating factor exists," which would violate *Mills*. *Id.* at 308. In that case the court found no constitutional infirmity since the jury instructions required unanimity only as to the "ultimate conclusion," rather than each "interim step in its deliberations," *i.e.*, the finding of mitigating factors. Similarly in *Arnold v. Evatt*, the Fourth Circuit held that instructing the jury that its sentence must be unanimous, and that it must unanimously find the existence of any aggravating circumstances, did not violate *Mills* since the jury instructions at issue "never required the jury to find any mitigating factor unanimously." *Arnold*, 113 F.3d at 1363. *See also Powell*, 112 F.3d at 971; *James*, 926 F.2d at 1448-1449. What these cases recognize, as the dissent did below, is that this Court has found a unanimity requirement problematic in only two situations: "(1) to reject the death penalty, and (2) as to the presence of a mitigating factor." *Davis*, 318 F.3d at 696 (Boggs, J., dissenting). A general instruction requiring unanimity as to the "ultimate conclusion," however, always has been, and still remains, entirely compatible with the Constitution.

Just like the decisions cited above, the instructions at issue here did not require unanimity as to an "interim step in the deliberations," which would violate the Constitution under *Mills*, but only as to the overall weighing process, which has been repeatedly held permissible. *See* discussion, *supra*. In fact, as noted above, the panel majority's new requirement—that the trial judge must affirmatively notify the jury that one juror has the ability to block the death penalty—directly contradicts this Court's warning that such instructions encourage deadlock and undermine the strong governmental interest in unanimous verdicts. *See Jones*, 527 U.S. at 381-384.

Nor does the panel majority's reliance on *Ohio v. Brooks*, 661 N.E.2d 1030 (Ohio 1996), do anything to save its conclusion. *See Davis*, 318 F.3d at 689. While *Brooks* does suggest the use of an instruction affirmatively informing the jury that any single juror has the ability to block the death penalty, *see Brooks*, 661 N.E.2d at 1042, it reached this decision on state law grounds, not federal constitutional grounds. And this Court itself has held that "the fact that [an] instruction was allegedly incorrect under state law (in this case a state law that came long after Davis's trial) is not a basis for habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). Moreover, even if the Ohio Supreme Court reached its decision on federal constitutional grounds, AEDPA restricts habeas review to those constitutional rights "clearly established" by this Court's precedent, not that of Ohio's Supreme Court. *See* 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 413 (2000).

The *only* issue on collateral review in federal court is whether a state court decision violated a defendant's federal constitutional rights. Before the panel majority's decision below, requiring the jury to unanimously agree on the outcome of the weighing process did not amount to a constitutional violation under *Mills*. In fact, the Sixth Circuit itself has repeatedly held that "such a unanimity instruction as to sentencing recommendations of death [does] not violate the Constitution." *Roe*, 316 F.3d at 564; *Coe*, 161 F.3d at 339-340; *Scott*, 209 F.3d at 876.

What makes the panel majority's conclusion in this regard all the more baffling is that the Sixth Circuit previously determined that the actual jury instructions at issue here *do not run afoul* of either the Constitution or *Brooks*. *Henderson*, 262 F.3d at 622. In *Henderson*, the Sixth Circuit noted that Davis's instructions were constitutional because they "adequately informed the jury that a recommendation of death required unanimity and the

instruction made the jurors aware that any one of them could block the imposition of a death sentence." *Id.* Consequently, the very instructions at issue here have been upheld as a model of constitutionality by one panel while being struck down by another—a result that raises a troubling specter of inconsistency.

Like the other two "constitutional violations" the panel majority identified below, this Court has never determined that a unanimity instruction as to the results of the weighing process is improper. As a result, the panel majority's decision has created a conflict with this Court's decisions, with its sister circuits, and with the Sixth Circuit's own previous decisions, regarding this issue. Given the panel majority's decision here, a state trial judge must now give an additional jury instruction expressly reminding the jury that each juror may prevent a death sentence. As the dissent eloquently put it, however, "[w]hile that is a correct statement of existential truth, no case, and certainly no Supreme Court case, has come close to requiring that such an instruction be given." *Davis*, 318 F.3d at 697 (Boggs, J., dissenting). Accordingly, the Warden respectfully requests this Court to grant certiorari and correct the erroneous intrusion on State sovereignty created by the decision below.

II. The Decision Below Creates Troubling Inconsistencies In The Application Of The Death Penalty And Calls Into Question The Validity Of Nearly Every Current Capital Sentence In Ohio.

A. The intra-circuit conflict provides an independent basis for granting certiorari here.

As noted above, in addition to creating a number of inter-circuit conflicts, the decision below also creates a direct intra-circuit conflict. Although the Warden would not

normally rely on such an intra-circuit conflict to support a request for certiorari, the nature of the conflict here provides an independent basis for this Court to grant certiorari in this case.

Because of the severity and irrevocability associated with the death penalty, this Court has repeatedly held that the Eighth Amendment requires that death sentences not be imposed arbitrarily or capriciously. *See, e.g., Jones*, 527 U.S. at 381; *Buchanan v. Angelone*, 522 U.S. 269, 274 (1998). Indeed, Ohio changed its capital sentencing scheme to insure that this requirement is met, and it was successful in its efforts. *See e.g., Jamison v. Collins*, 100 F. Supp.2d 647 (S.D. Ohio 2000), *aff'd* 291 F.3d 380 (6th Cir. 2002) ("The Ohio capital punishment scheme assailed by Petitioner falls within the boundaries of the standard set by the Supreme Court.").

Now, however, despite this recognized need for uniformity, the Sixth Circuit itself is fostering inconsistency in the application of the death penalty. With decisions like *Davis* and *Mapes* on one side of the argument and *Roe*, *Buell* and *Scott* on the other, the validity of a particular sentence no longer rests upon a clearly established rule of law, but rather on which of two competing, and irreconcilable, lines of precedent the court elects to apply.

This intra-circuit conflict is already creating confusion at the district court level. In *Henderson v. Collins*, Case No. C-1-94-106 (S.D. Ohio July 10, 2003) (attached as Appendix F), for instance, the court found it necessary to reconsider its earlier ruling on the validity of the defendant's "acquittal-first" instruction. Although the Sixth Circuit had already ruled that Henderson's instructions were acceptable, *see Henderson*, 262 F.3d at 622-623, the district court on remand noted that the *Henderson* instructions were "indistinguishable" from the *Davis* instructions. Appx., pp.

112a-114a. Thus, the court determined that "the decision made by the Sixth Circuit [upholding Henderson's conviction] has been called into grave doubt." *Id.* at 114a. It therefore vacated its earlier ruling and granted a "writ of habeas corpus in regard to jury instructions." *Id.* at 115a. In doing so, the court further opined that the decision below in this case "may well create confusion and lead to conflicting decisions in district courts." *See also Taylor v. Mitchell*, Case No. 1:01CV601, 2003 U.S. Dist. Lexis 4383 at *64 (N.D. Ohio March 3, 2003) (noting that *Davis* creates a conflict with *Coe*, *Scott*, and *Roe*, and further noting that "the *Davis* court did not distinguish—indeed, it failed to cite"—those cases) (attached as Appendix G).

The Warden recognizes that, normally, intra-circuit conflicts are more properly resolved *en banc*, and the Warden attempted to pursue that course here. The Sixth Circuit, however, declined that request. Appx., pp. 31a-32a. The heightened need for uniformity in capital sentencing rules, combined with the Sixth Circuit's unwillingness to accept *en banc* review, provides an additional ground supporting certiorari here.

B. The decision below destroys Ohio's ability to implement its capital sentencing scheme.

In addition to creating a conflict that is already causing confusion and inconsistency in the courts below, the decision here also completely undermines Ohio's ability to effectively implement its capital sentencing scheme. There are over 200 inmates on death row in Ohio. Nearly all of these inmates received capital sentences based on jury instructions virtually indistinguishable from those held to be constitutionally invalid below. Thus, if allowed to stand, *the panel majority's erroneous opinion below will call into question the constitutionality of nearly every single currently-imposed Ohio capital sentence*. And, as *Taylor*

and *Henderson* demonstrate, Ohio's death row inmates are already incorporating *Davis* into their litigation strategies. Moreover, as the above discussion demonstrates, cases from other circuits suggest that very similar instructions are also used in other States. Thus, the erroneous decision below threatens to create confusion across the country.

CONCLUSION

As the panel majority itself noted, "[t]he developing law regarding the balancing of mitigating factors against aggravating factors in death penalty cases is of relatively recent vintage and many questions about its application remain unanswered." *Davis*, 318 F.3d at 686. Unfortunately, its decision below adds to the confusion. Accordingly, the Warden respectfully urges this Court to accept certiorari to provide clear guidance on these vitally important and frequently recurring questions of capital habeas jurisprudence.

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Supreme Court, U.S.
FILED

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No. _____

In The Supreme Court Of The United States

BETTY MITCHELL, Warden,

Petitioner,

v.

WILEY DAVIS, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-4193

WILEY DAVIS, JR.,
Petitioner-Appellant,

v.

BETTY MITCHELL, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Ohio at Akron. No. 99-01649. James Gwin, District Judge.

Argued: October 31, 2002
Decided and Filed: February 4, 2003

Before: MERRITT, BOGGS, and MOORE, Circuit Judges. MERRITT, J., delivered the opinion of the court, in which MOORE, J., joined. BOGGS, J., delivered a separate dissenting opinion.

COUNSEL

ARGUED: Laurence E. Komp, Baldwin, Missouri, for Appellant. Charles L. Wille, ATTORNEY GENERAL'S OFFICE OF OHIO, CAPITAL CRIMES SECTION, Columbus, Ohio, for Appellee. ON BRIEF: Laurence E. Komp, Baldwin, Missouri, John Patrick Parker, Cleveland, Ohio, for Appellant. Charles L. Wille, ATTORNEY GENERAL'S OFFICE OF OHIO, CAPITAL CRIMES SECTION, Columbus, Ohio, for Appellee.

OPINION BY: MERRITT

OPINION

MERRITT, Circuit Judge. Immediately following the trial court's instruction regarding mitigating circumstances, the trial judge in this death penalty case from Ohio gave the jury a unanimity instruction, stating, "Now, as you know, since this is a criminal case, the law requires that in order for you to reach a decision all 12 of you must be in agreement." n1 In addition to this express unanimity instruction in close proximity to the instruction on mitigating circumstances, the trial judge gave the jury a so-called "acquittal-first" instruction stating that it must first analyze whether the elements allowing the death penalty were present, and only if they were not present, should the jury move on to consider life imprisonment:

Now, the procedure which you must follow in arriving at your verdict in the sentencing phase of the trial is set forth in Revised Code Section 2929.03 of the Revised Code of the State of Ohio.

. . . If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances which Wiley Davis, Jr. was found guilty of committing outweigh the mitigating factors, if any, then you must return such finding to the Court.

I instruct you as a matter of law that if you make such finding then you have no choice and must recommend to the Court that the sentence of death be imposed upon the defendant, Wiley Davis, Jr.

On the other hand, if after considering all of the relevant evidence raised at trial, the testimony, other evidence, the unsworn statement of Wiley Davis, Jr. and the arguments of counsel, you find that the State of Ohio failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant, Wiley Davis, Jr., was found guilty of committing, outweigh the mitigating factors, then you will return your verdict reflecting your decision; *that is, you must find that the State has failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant was found guilty of committing outweigh the mitigating factors.*

In this event you will then proceed to determine which of the two possible life imprisonment sentences to recommend to the Court.

> n1 Just before this unanimity instruction, the judge told the jury about the verdict forms which the jury would have before it. On each form the jury was told that there would be 12 "bars" for each of the 12 jurors to sign to carry out the unanimity requirement. Immediately before the unanimity instruction quoted above, the trial judge gave the jury the following instruction with regard to the verdict form on a finding that the mitigating factors outweighed the aggravating factors, as follows:
>
> We, the jury in this case, being duly impaneled and sworn, do find that the Aggravating Circumstances which the defendant, Wiley Davis, Jr., was found guilty of committing are not sufficient to outweigh the Mitigating Factors present in this case beyond a reasonable doubt," and "We, the jury, recommend that the defendant, Wiley Davis, Jr., be sentenced to life imprisonment with parole eligibility after serving—and then down here there is an asterisk that says, 'Insert in

> ink either (20) or (30) full years of imprisonment," and, again, 12 signature bars.'" (J.A. at 242-44.)

The habeas petitioner argues that these two interconnected instructions—the unanimity instruction and the acquittal-first instruction—constitute constitutional error under the Eighth Amendment because there was a reasonable likelihood that jurors would understand the instruction to mean that juror unanimity was required to mitigate the punishment from death to life. In upholding the death penalty in this case on direct appeal, the Ohio Supreme Court observed that these instructions "lacked clarity," suggesting that they could be misconstrued. In fact, there is a reasonable likelihood that the jury believed that it could not render a verdict in favor of life imprisonment rather than death unless the jury was unanimous with respect to its reasoning on the presence of mitigating factors and unless the jury was unanimous in rejecting the death penalty. Instructions that leave a jury with the impression that juror unanimity was required to mitigate the punishment from death to life imprisonment clearly violate the Eighth Amendment, and therefore the writ of habeas corpus must issue setting aside the death sentence.

Facts and Procedural History

On June 1, 1992, the Cuyahoga County Court of Common Pleas adopted the jury's recommendation and sentenced Wiley Davis to death for the brutal kidnaping and murder of Amy Perkins. Davis appealed his conviction to the Cuyahoga County Court of Appeals, which affirmed Davis's conviction but set aside that portion of his sentence that called for his placement in solitary confinement each year on the anniversary of Amy Perkins's death. In 1996, the Ohio Supreme Court affirmed both the murder conviction and sentence of death. The state court denied Davis's petition for post-conviction relief, and in 1998, the Cuyahoga County

Court of Appeals affirmed the trial court's decision denying post-conviction relief. In 1999, the Ohio Supreme Court declined to exercise jurisdiction over Davis's appeal of that decision as one not involving any significant constitutional claim.

On August 23, 2000, the District Court for the Northern District of Ohio denied Davis's petition for a writ of habeas corpus. With respect to Davis's contention that the trial court's instruction failed to notify each juror of his or her right to unilaterally prevent a death penalty recommendation, the district court held that it was reasonable for the Ohio Supreme Court to conclude that the trial court's instructions "when read as a whole, adequately informed the jury of the proper manner to deliberate and choose a death penalty recommendation." *See Davis v. Mitchell, 110 F. Supp. 2d 607, 624 (N.D. Ohio 2000).* This Court has granted a certificate of appealability on four of Davis's claims, one of which is his claim that the trial court's instruction prevented jurors from giving effect to mitigation.

Analysis

The developing law regarding the balancing of mitigating factors against aggravating factors in death penalty cases is of relatively recent vintage and many questions about its application remain unanswered. Thirteen years before the Supreme Court decided *Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972)* (holding death sentences imposed under statutes that left juries with untrammeled discretion to impose or withhold the death penalty violative of the Eighth and Fourteenth Amendments), the drafters of the American Law Institute's 1962 Model Penal Code proposed the balancing of statutorily specified aggravating and mitigating circumstances as a method to restrain unguided discretion in the capital sentencing process. *See* American Law Institute, Model Penal Code § 201.6 (Tent.

Draft No. 9, 1959) (eventually adopted as § 210.6 of the 1962 Model Penal Code). Although the drafters did not elaborate on any particular method for weighing the two sets of circumstances, they sought to guide the discretion of jurors by requiring them to find that, in light of the statutorily defined mitigating circumstances and any other facts deemed relevant, "there are no mitigating circumstances sufficiently substantial to call for leniency." Model Penal Code § 210.6(2) (1962). Nor was it clear in these proposals when unanimity among jurors should be required at any given stage of the proceedings, except that unanimity would be required for the imposition of the death sentence. *See* Model Penal Code § 201.6(2) (alternative formulation), at 60 & commentary at 78-79 (Tent. Draft No. 9 1959); Model Penal Code § 210.6(2) (1962). After *Furman* was decided in 1972, many states incorporated aspects of the Model Penal Code in their statutes reinstating the death penalty. These states adopted, with varying degrees of modification, the Code's aggravator-mitigator dual standard. In *Gregg*, the Supreme Court approved the Code's balancing standard as a general solution to the Eighth Amendment problem of uncertain, standardless state laws found invalid in *Furman*. *See Gregg v. Georgia, 428 U.S. 153, 193-195, 49 L. Ed. 2d 859, 96 S. Ct. 2909 & nn.44-45 (1976).*

In 1994, Congress enacted the Federal Death Penalty Act using this dual standard. That Act states that "the finder of fact shall consider any mitigating factor" raised by the defendant in deciding whether to impose the death penalty and that such

[a] finding with respect to a mitigating factor may be made by 1 or more members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such factor established for purposes of this section regardless of the number of jurors who concur that the factor has been established.

18 U.S.C. § 3593(d). Thus under the Federal Death Penalty Act, not only is the burden of persuasion different for aggravating and mitigating factors, the unanimity requirement that exists for aggravating factors does not exist with respect to mitigating factors. Any one or more jurors may find the existence of a mitigating factor and may then consider that factor in weighing the aggravating and mitigating factors even though other jurors may not agree that the particular mitigating factor has been established. This weighing decision must be made by each juror giving individual consideration to the aggravating factors unanimously found by all of the jurors and such mitigating factors as may be found by each juror. n2

> n2 *United States v. McVeigh*, 96- *CR-68, 1997 WL 312609*, at *42 (D. Colo. June 12, 1997) (official transcript of trial court's instructions to the jury in federal death penalty case); *see also United States v. Jones, 527 U.S. 373, 392 n.10, 144 L. Ed. 2d 370, 119 S. Ct. 2090 (1999)* ("'A finding with respect to a mitigating factor may be made by any one or more of the members of the jury, and any member who finds by a preponderance of the evidence the existence of a mitigating factor may consider such factor established for his or her weighing of aggravating and mitigating factors regardless of the number of other jurors who agree that such mitigating factor has been established.'") (quoting the trial court's instructions).

This provision of the Act was first adopted on the Senate floor by an amendment offered by Senator D'Amato to an earlier version of the federal death penalty bill and then later adopted in a reconciliation bill after different versions of the bill were sent to a conference committee. The reason given for adopting this language in the Federal Death Penalty Act

of 1994 was explained by Senator D'Amato on the Senate floor when he originally offered the amendment in 1988:

> Mr. President, this amendment brings us into conformity with the Tuesday Supreme Court decision in *Maryland* versus *Mills*. Basically, it says that you must have a unanimous decision by a jury as it relates to the imposition of the death penalty. Even if one juror says there was mitigating circumstances of any sort, the death penalty cannot be imposed. It makes this very clear. That is what this language does. It brings us in conformance with that decision. I hope we can accept it without the necessity of going through a debate and rollcall vote.

134 Cong. Rec. 14,103-04 (1988) (statement of Sen. D'Amato regarding Amendment 2343 to S. 2455).

We agree that this treatment of mitigating factors set out by Congress in § 3593 of the Federal Death Penalty Act is required by the Eighth Amendment. In *Mills v. Maryland, 486 U.S. 367, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988)*, and *McKoy v. North Carolina, 494 U.S. 433, 108 L. Ed. 2d 369, 110 S. Ct. 1227 (1990)*, the Supreme Court held unconstitutional any requirement that "prevents the jury from considering, in deciding whether to impose the death penalty, any mitigating factor that the jury does not unanimously find." *McKoy, 494 U.S. at 435*.

Rather, *Mills* requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death. This requirement means that, in North Carolina's system, each juror must be allowed to consider all mitigating evidence . . . whether aggravating circumstances outweigh mitigating circumstances, and whether the aggravating circumstances, when considered with any mitigating circumstance, are sufficiently substantial to justify a sentence

of death. Under *Mills*, such consideration of mitigating evidence may not be foreclosed by one or more jurors' failure to find a mitigating circumstance . . . .

Id. at 443.

The reason that aggravating factors must be found unanimously is that they are the elements of the murder offense that make the defendant death eligible. *See Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 2443, 153 L. Ed. 2d 556 (2002)* (holding that because Arizona's enumerated aggravating factors operate as the functional equivalent of elements of the offense, the Sixth Amendment requires that they be found by a jury). All of the elements of a criminal offense must be found by a jury unanimously as a matter of constitutional criminal procedure, *see Richardson v. United States, 526 U.S. 813, 119 S. Ct. 1707, 1710, 143 L. Ed. 2d 985 (1999),* particularly all elements that make a defendant death eligible, *see Ring, 122 S. Ct. at 2431.*

Mitigating factors, on the other hand, are not viewed as elements of the crime but rather as evidence relevant to a defendant's character or record or other circumstances of the offense that might lead a sentencer to decline to impose the death sentence. *See McCleskey v. Kemp, 481 U.S. 279, 304, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987).* Accordingly, a state may not require unanimity in finding mitigating factors. Such a requirement "impermissibly limits jurors' consideration of mitigating evidence." *McKoy, 494 U.S. at 444.* In fact, as *Mills* and *McKoy* hold, any requirement that mitigating factors must be found unanimously is incoherent. *See Mills, 486 U.S. at 400; McKoy, 494 U.S. at 442-43.* A unanimity requirement on mitigating factors would mean that, if aggravating factors have been found by the jury, one or more jurors who—in disagreement with other jurors—find no mitigating factor, or find different mitigating factors, or find that the aggravating factors do not outweigh mitigating

factors found by some (but not all) of the jurors, or find that no mitigating factor outweighs aggravating factors, could still produce a death verdict or a hung jury, depending on how state law treats the disagreement. Thus, in order for Eighth Amendment law on mitigating factors to be coherent and capable of judicial administration without serious confusion, a capital jury must understand that, in the words of the Federal Death Penalty Act, "a finding with respect to a mitigating factor may be made by one or more members of the jury."

With that background about the development of Eighth Amendment law regarding mitigating factors, we are now in position to apply these principles to the facts of the instant case. Our inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Jones v. United States, 527 U.S. 373, 390, 144 L. Ed. 2d 370, 119 S. Ct. 2090 (1999); see also Boyde v. California, 494 U.S. 370, 380, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990).*

Ohio's death penalty statute requires that in order for a jury to recommend a sentence of death, it must unanimously find that the aggravating circumstances outweigh any mitigating circumstances present in the case. In the absence of a unanimous finding that death is appropriate, the jury must recommend imprisonment for a unanimously agreed-upon specified term. n3 Although the Supreme Court has indicated that the weighing of aggravating and mitigating circumstances in death penalty cases is not itself constitutionally required, once a state has adopted that method of narrowing the class of persons eligible for the death penalty and providing for individualized juror consideration of the appropriateness of the death penalty in a particular case, the Eighth Amendment requires that jurors not be precluded from giving effect to the mitigating evidence by an instruction requiring unanimity as to the

presence of mitigating circumstances. *See Mills, supra.* Any instruction requiring that a jury must first unanimously reject the death penalty before it can consider a life sentence likewise precludes the individual juror from giving effect to mitigating evidence and runs afoul of *Mills.*

> n3 Section 2929.03(D)(2) of the Ohio Revised Code provides in relevant part:
>
> Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to [life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment].

The Ohio Supreme Court has recognized that under Ohio's death penalty statute, a sole juror can prevent the death penalty if he or she individually finds that mitigating circumstances are present in the case and does not agree that the aggravating circumstances outweigh the mitigating circumstances. *See Ohio v. Brooks, 75 Ohio St. 3d 148, 661 N.E.2d 1030, 1042 (Ohio 1996).* The resulting non-

unanimous jury (as to the death penalty) must nevertheless return a unanimous verdict as to which of the sentences of imprisonment should be imposed.

Given the requirement of unanimity as to the jury's ultimate recommendation of either death or life under Ohio law, it is not surprising that the unarticulated but constitutionally required non-unanimous mechanism that will prevent a recommendation of death is obscured to such an extent that it cannot even be said to be implied by the instructions in this case. Instead of instructing the jury that it need not be unanimous in rejecting the death penalty, the trial judge in this case told the jury that in order to return a verdict for life imprisonment, "you must find that the State has failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant was found guilty of committing outweigh the mitigating factors." Immediately thereafter, the Court instructed that "since this is a criminal case the law requires that in order for you to reach a decision all 12 of you must be in agreement." The verdict form likewise reflected a unanimity requirement in finding that the aggravating circumstances do not outweigh the mitigating circumstances, setting out twelve signature lines under the statement, "We, the jury . . . do find that the Aggravating Circumstances which the defendant, Wiley Davis, Jr., was found guilty of committing are not sufficient to outweigh the Mitigating factors present in this case beyond a reasonable doubt." This instruction, combined with the jury verdict form, not only "could" but by its plain language "would" lead a reasonable juror to conclude that the only way to get a life verdict is if the jury unanimously finds that the aggravating circumstances do not outweigh the mitigating circumstances, an entirely different instruction from one that clearly informs the jurors that a life verdict can be rendered by a jury that has not first unanimously rejected the death penalty. Further adding to the confusion, the jury was never told, either expressly or impliedly, that individual jurors may

consider mitigating circumstances in the weighing process regardless of the lack of agreement with other jurors as to the presence of that factor. In sum, the silence in these instructions on the lack of unanimity required for mitigating circumstances, the improper "acquittal-first" instruction, and the unqualified instruction, "Now, as you know . . . the law requires that in order for you to reach a decision all 12 of you must be in agreement"—would have led a reasonable jury to apply an unconstitutional standard of unanimity at all stages in the deliberative process.

The error in the present case is approximately the same as the error described by Judge Becker in *Frey v. Fulcomer, 132 F.3d 916* (3d Cir. 1997). In that case, the Court of Appeals for the Third Circuit vacated a death sentence as violating *Mills* where "the relevant portion of the jury charge emphasized the importance of a unanimous finding, using the phrase frequently and in close proximity—within seven words of—the mitigating circumstances clause," without explaining that unanimity is not required in consideration of mitigating evidence. *Id. at 923*. Here, as there, the trial court's instructions are silent as to the different unanimity requirements for aggravating and mitigating circumstances, making no mention of the individual juror's power to prevent the death penalty by giving effect to mitigating circumstances absent the agreement of the other jurors regarding the presence of those mitigating circumstances. Nor do they make clear that the jury need not be unanimous in rejecting death in order to render a verdict for life imprisonment. The inescapable likelihood in this case that the jury understood the instructions to require unanimity in both its ultimate and interim conclusions violates *Mills*.

Our dissenting colleague has failed to describe the record correctly with respect to the Ohio trial court's unanimity instruction regarding mitigating factors. In his dissenting opinion immediately following this opinion, he says that the

Ohio trial court's unanimity instruction—"since this is a criminal case, the law requires that in order for you to reach a decision all 12 of you must be in agreement"—is "seventy lines and a recess away" from the instruction on "weighing mitigating factors" and is unrelated to mitigating factors. This is simply wrong, as the record itself demonstrates.

As to aggravating and mitigating factors, the trial judge instructed the jury that they must consider and sign one of two verdict forms. The first form he read to them was the verdict form for imposing the death penalty. He then said immediately:

And there are twelve signature bars, where you would sign that [verdict form], if that was your verdict.

The second verdict [form] as to Count One [acquittal of the death penalty] says:

"We, the Jury in this case, being duly impaneled and sworn, do find that the Aggravating Circumstances which the defendant, Wiley Davis, Jr., was found guilty of committing are not sufficient to outweigh the Mitigating Factors present in this case beyond a reasonable doubt" and "We, the Jury, recommend that the defendant, Wiley Davis, Jr. be sentenced to life imprisonment with parole eligibility after serving"—and then down here there is an asterisk that says, "Insert in ink either twenty (20) or thirty (30) full years of imprisonment" *and, again, twelve signature bars* [for each of you to sign]. (Emphasis added.)

Immediately following this instruction regarding their finding that the aggravating circumstances "are not sufficient to outweigh the mitigating factors" the court says:

Now, as you know, since this is a criminal case the law requires that in order for you to reach a decision all twelve of you must be in agreement.

It is hard to conceive how this instruction concerning unanimity and the need for each juror to sign one of the twelve bars could be anymore plain that the jury must be unanimous if it finds that one or more mitigating factors outweighs the aggravating circumstances. This instruction—in the words of *Williams v. Taylor, 529 U.S. 362, 413, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000)*—is clearly "opposite to that reached by [the Supreme] Court on a question of law" in the *Mills* and *McKoy* cases discussed above. Our dissenting colleague is simply unable to get around the clarity of the erroneous instructions that the jury must be unanimous as to mitigators and that each juror must so attest by signing a form demonstrating unanimity.

The "acquittal first" instruction and absence of any other instruction which conflicts with the requirement of unanimity on mitigators would simply reinforce in the mind of each juror that unanimity was required for both aggravators and mitigators.

Accordingly, the judgment of the district court is reversed and the case remanded with instructions to issue the writ of habeas corpus, unless the State of Ohio conducts a new penalty proceeding within 180 days after remand. All other issues in the case raise claims of error in the sentencing phase of the case, and as such, are pretermitted in light of our decision to issue the writ as to this phase of the case.

DISSENT

BOGGS, Circuit Judge, dissenting. Petitioner Davis's claim for habeas relief is reviewed by this court pursuant to the dictates of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), *28 U.S.C. § 2254*(d). As Davis does not challenge any of the state court's factual findings, this court may grant the writ only "if the state court arrived at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decided a case differently than [the Supreme] Court has on a set of materially indistinguishable facts . . . ," or "if the state court identified the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applied that principle to the facts of the prisoner's case." *Williams v. Taylor, 529 U.S. 362, 413, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000).*

The court states that "in sum, the silence in these instructions on the lack of unanimity required for mitigating circumstances, the improper 'acquittal-first' instruction, and the unqualified instruction, 'Now, as you know . . . the law requires that in order for you to reach a decision all 12 of you must be in agreement'—would have led a reasonable jury to apply an unconstitutional standard of unanimity at all stages in the deliberative process." Page 12. The court thus attacks three parts of the instruction process: (1) what it calls an "acquittal-first" instruction; (2) the failure to give an explicit instruction that unanimity is *not* required for any individual juror to find a mitigating factor; and (3) the giving of a standard instruction that the return of a formal verdict requires jury unanimity. Each of these three aspects of the instructions is unexceptionable, and the action of the Ohio

Supreme Court in upholding these instructions certainly does not constitute an unreasonable application of any clearly established precedent of the United States Supreme Court. I will discuss each of these three aspects in turn.

The court also states that "the habeas petitioner argues that these two interconnected instructions—the unanimity instruction and the acquittal-first instruction—constitute constitutional error under the Eighth Amendment because there was a reasonable likelihood that jurors would understand the instruction to mean that juror unanimity was required to mitigate the punishment from death to life." Pages 3-4.

The court does not cite the place where Davis makes such an argument, and I can find none. The court instead has conflated several arguments in order to avoid precedent from this circuit that would defeat any one of them alone.

A. "Acquittal-first" instruction

The Ohio Supreme Court rejected Davis's argument that the instruction given by the judge during his sentencing phase was an improper "acquittal-first" instruction that would warrant reversal of his capital sentencing. *State v. Davis, 76 Ohio St. 3d 107, 666 N.E.2d 1099 (Ohio 1996).* After reviewing all of the instructions given in the case, the court concluded that "it is clear that the jury was adequately informed that unanimity was required to return a death penalty recommendation. Each juror was made aware that he or she could prevent a death penalty recommendation by finding that the aggravating circumstances in the case do not outweigh the mitigating factors . . . ." *666 N.E.2d at 1109.* The question before this court is whether the Ohio Supreme Court unreasonably applied the correct governing legal principle, established in *Mills v. Maryland, 486 U.S. 367, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988),* that "the sentencer

may not refuse to consider or be precluded from considering any relevant mitigating evidence . . . ." *Id. at 374-75* (citing *Skipper v. South Carolina, 476 U.S. 1, 4, 90 L. Ed. 2d 1, 106 S. Ct. 1669 (1986)* (quoting *Eddings v. Oklahoma, 455 U.S. 104, 114, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982)*) (internal quotes and added emphasis omitted)).

The objection to "acquittal-first" instructions is not to the order of consideration, but to the possibility that a juror may be led to believe that the jury must first unanimously reject death before considering a life sentence, rather than allowing a single juror to prevent a death sentence by creating a deadlock. However, the Constitution does not forbid a jury from considering a death sentence before considering a life sentence. This issue was squarely addressed by this court in *Coe v. Bell, 161 F.3d 320, 339-40 (1998). See also Roe v. Baker, 2002 U.S. App. LEXIS 22645, 2002 WL 31426248,* *4-*6 (6th Cir. Oct. 31, 2002); *Henderson v. Collins, 262 F.3d 615, 621-22 (6th Cir. 2001)* (discussing instruction in considering constitutionality of subsequent *Allen* charge); *Scott v. Mitchell, 209 F.3d 854, 873-76 (6th Cir. 2000).*

The relevant Ohio statute provides:

If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

Ohio Rev. Code Ann. § 2929.03(D)(2) (1994). The very structure of the statute implies that jurors may first consider

the death penalty. It is clear that a unanimous finding is required in order to recommend death; however, the language "absent such a finding" implies that a unanimous finding is *not* required in order to reject the death penalty. Yet, unanimity among the jurors is required in order to impose one of the life sentences. *State v. Jenkins, 15 Ohio St. 3d 164, 15 Ohio B. 311, 473 N.E.2d 264, 307* (Ohio, 1984) ("we conclude in returning a sentence of life imprisonment under R.C. 2929.03(D)(2), the jury's verdict must be unanimous").

The court claims that the "unarticulated but constitutionally required non-unanimous mechanism that will prevent a recommendation of death is obscured to such an extent that it cannot even be said to be implied by the instructions in this case." Page 11. However, this circuit has held that there is no constitutional requirement that a judge inform the jury as to the effect of a failure to be unanimous in reaching a verdict. *See Coe, 161 F.3d at 339-40.* In *Jones v. United States, 527 U.S. 373, 144 L. Ed. 2d 370, 119 S. Ct. 2090 (1999),* the Supreme Court held the same thing in the context of the Federal Death Penalty Act. In *State v. Brooks, 75 Ohio St. 3d 148, 661 N.E.2d 1030 (Ohio 1996),* the Ohio Supreme Court held that Ohio state courts must instruct the jury that a solitary juror may prevent imposition of the death penalty. *661 N.E.2d at 1040-42.* This rule is prospective, and was not in force when Davis was sentenced to death. Regardless, "the fact that [an] instruction was allegedly incorrect under state law is not a basis for habeas relief." *Estelle v. McGuire, 502 U.S. 62, 71-72, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991).* The court appears to impose this rule on Ohio courts retroactively and institute a requirement that jurors be apprised of the effect of their individual power to deadlock the jury.

The contrast between the instructions at issue here, and the instructions in *Brooks*, is illuminating. In *Brooks*, the judge stated to the jury as follows: "You are now required to

determine unanimously that the death penalty is inappropriate before you can consider a life sentence." *661 N.E.2d at 1040*. Such an instruction is thought to violate *Mills* and *McKoy v. North Carolina, 494 U.S. 433, 108 L. Ed. 2d 369, 110 S. Ct. 1227 (1990)* because it may lead a juror to believe that the sufficiency of mitigating factors has to be found unanimously; and also may lead a juror to believe that unless all jurors are disposed to grant mercy, that a defendant must be sentenced to death.

The very same court that decided *Brooks* stated that the instructions in Davis's sentencing phase were distinguishable from those in *Brooks* because the jury was never instructed that it must unanimously reject the death penalty before it could consider the life sentences. *Davis, 666 N.E.2d at 1109*. The majority correctly notes that the court in *Davis* stated that the instructions "lacked the clarity of the model instruction contemplated in *Brooks*." *Ibid*. However, there is no constitutional requirement "to be a model of clarity"; moreover, the lack of clarity did not preclude the Ohio Supreme Court from finding that the jurors in the instant case were adequately instructed that unanimity in rejecting the death penalty was not required before they could consider the life sentences.

Indeed, the instructions in this very case, *State v. Davis*, were used by both the majority and the dissent in *Henderson v. Collins, 262 F.3d 615 (6th Cir. 2001)*, to demonstrate permissible instructions. Notably, the dissent in *Henderson* (favoring the reversal of a death sentence) discussed the Ohio Supreme Court's consideration of further instructions given to the jury in this case. The dissent notes that after the judge instructed the jury regarding the death penalty and the life sentences, the judge went on to caution the jurors:

Now, your initial conduct upon entering the jury room, again, is a matter of importance. You should consult with each

other; consider each other's views, and deliberate with an objective of reaching an agreement, if you can do so, without doing violence to your individual conscience and good judgment.

You should do so only after a discussion and a consideration of the case with your fellow jurors.

Remember, each of you is equal in the jury room, and you shouldn't hesitate to change your opinion if convinced by your fellow jurors that you are wrong.

However, do not surrender any honest conviction in order to be congenial, or to reach a verdict solely of the belief of the other jurors.

Id. at 627 (Clay, J., dissenting) (citing *Davis, 666 N.E.2d at 1109)* (added emphasis omitted). These instructions track almost exactly the Ohio pattern jury instructions regarding "Conduct while deliberating." Ohio Jury Instructions § 413.70. The dissent in *Henderson* noted that the Ohio Supreme Court reviewed all the instructions and concluded that each juror was aware of his or her ability to prevent a death penalty recommendation. *Ibid.* (Clay, J., dissenting).

The Ohio Supreme Court's decision was not an unreasonable application of *Mills* or *McKoy*. The court's conclusion to the contrary squarely contradicts binding Sixth Circuit precedent.

B. Lack of unanimity required for mitigating circumstances

The court is also troubled because "the jury was never told, either expressly or impliedly, that individual jurors may consider mitigating circumstances in the weighing process

regardless of the lack of agreement with other jurors as to the presence of that factor." Pages 11-12. This also purportedly violates the dictates of *Mills*.

The Supreme Court in *Mills* vacated the petitioner's death sentence and remanded the case to the Maryland Court of Appeals for resentencing. The Court took issue with the structure of the Maryland sentencing scheme. In that scheme, the verdict forms provided to the jury listed each aggravating circumstance the prosecution was attempting to prove. The jurors then collectively had to write "yes" or "no" next to each factor, indicating whether they unanimously believed that the prosecution had proved each aggravating factor beyond a reasonable doubt. A similar form was presented to the jury for mitigating factors. After filling out the forms, the jurors would proceed to the weighing stage, at which time they would decide, unanimously, whether the aggravating factors outweighed the mitigating factors. The Supreme Court concluded that the risk was too great that, in Maryland, a juror would believe that in order for a mitigating factor to be considered in the weighing process, that it would have to be unanimously found present.

This is a far cry from the situation presented in this case. There is no indication anywhere in the instructions that each mitigating factor had to be agreed to unanimously. The judge instructed the jury that they were to weigh the evidence presented and determine whether the aggravating factors were sufficient to outweigh "any mitigating factor or factors you find that are present in this case." Transcript, p. 1888. The judge then instructed the jury that if the state failed to prove beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors, then they were to return a verdict reflecting this finding. Transcript, p. 1889.

Nowhere in the instructions did the judge state, or even imply, that jurors were restricted to considering mitigating factors that all the jurors had agreed were present. Such an instruction would violate *McKoy v. North Carolina*, in which the Supreme Court found unconstitutional any requirement that "prevents the jury from considering, in deciding whether to impose the death penalty, any mitigating factor that the jury does not unanimously find." *494 U.S. at 435*. However, that is all that *McKoy* says. Nowhere does it state that silence in instructions on the lack of a unanimity requirement for mitigating circumstances violates the Eighth Amendment.

The instructions in this case are very similar to those found unobjectionable in *Coe* and *Roe*. In *Coe*, the court found that nothing in the instructions could reasonably lead a juror to believe that unanimity was required as to the presence of a mitigating factor. The court stated that the instructions "required unanimity as to the results of the *weighing*, but this is a far different matter than requiring unanimity as to the *presence* of a mitigating factor." *161 F.3d at 338*. As in the instructions here, it was clear that the unanimity requirement applies to the weighing process, and not the presence of a mitigating factor.

The trial court here instructed the jury that "it is not only the quantity of the aggravating circumstances versus the quantity of mitigating factors which is to be the basis of your decision. It is the quality or importance of the mitigating factors and the aggravating circumstances which must be considered." Transcript, p. 1887. This strongly implies that each juror was to make his or her own independent judgment regarding each factor. While the jury was instructed on the unanimity requirement in finding aggravating factors, there was no parallel instruction regarding mitigating factors. The jury was specifically instructed as to those decisions in which unanimity was required. Any reasonable juror would

understand that where unanimity is not specifically instructed, those decisions should be made independently.

The state courts never reached the issue of any alleged unanimity requirement regarding the mitigating factors, as this claim was never presented to the state courts, the district court, nor to this court. But in failing to strike down this instructional system, the state court did not unreasonably apply Supreme Court precedent.

The court likens this case to *Frey v. Fulcomer, 132 F.3d 916 (3d Cir. 1997)*. The court in *Frey* found particularly objectionable a portion of a sentence in the jury instructions that read "if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance . . . ." *Id. at 923*. It was the propinquity, in the same sentence, within seven words, of "unanimously" and the mitigating circumstances clause that led the court to conclude that a juror might believe that a unanimous finding was required as to mitigating circumstances. *Ibid.* However, the court in *Frey* distinguished the instructions from another set of instructions that it had found unobjectionable in *Zettlemoyer v. Fulcomer, 923 F.2d 284 (3d Cir. 1991)*. In *Zettlemoyer*, the court found that the instructions only required "unanimity in the ultimate conclusion, and not in the interim findings leading to that conclusion." *Frey, 132 F.3d at 923*. The separation between "unanimously" and the mitigating circumstances clause in *Zettlemoyer* was seventeen words, even though it was still in the same sentence. *Ibid.* Here, the court also contends that the absence of an instruction notifying the jury that a unanimous finding is not required as to mitigating circumstances makes this case like *Frey*. In fact, the court in *Frey* specifically stated that "the absence of such an express statement is not dispositive" and stated that such an instruction is only one means that a trial court could use to clarify its instructions to the jury. *Id. at 923 n.5*.

This court has held that a trial court may instruct the jury that it must be unanimous in finding an aggravating factor, and may be silent as to the lack of a unanimity requirement in finding mitigating circumstances. *Kordenbrock v. Scroggy, 919 F.2d 1091, 1120 (6th Cir. 1990)* (en banc) (Judge Kennedy, announcing the holding of the court with respect to the jury instructions on unanimity). The court in *Kordenbrock* stated that since the trial court announced a unanimity requirement as to aggravating factors, but was silent as to mitigating factors, "it cannot be reasonably inferred that silence as to finding a mitigating factor would likely cause the jury to assume that unanimity was also a requirement. Indeed it would indicate the opposite." *919 F.2d at 1121.* Judge Merritt wrote, *contra* to the majority holding on this issue, that "the verdict of death may not have been imposed had they understood that one juror could block the death sentence if he or she believed there were sufficient mitigating circumstances." *Id. at 1110.* This is essentially the same position he takes in the instant case. However, as the court held in *Kordenbrock*, it is not constitutionally required that the jury be so instructed.

The court states that the instruction "you must find that the State has failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant was found guilty of committing outweigh the mitigating factors" was followed "immediately thereafter" by the instruction "since this is a criminal case the law requires that in order for you to reach a decision all twelve of you must be in agreement." Page 11. In fact, these two instructions are separated by about 70 lines of the transcript, and, additionally, by a recess taken by the court because the verdict forms were not in order. *Compare* Transcript p. 1889, line 18 *with* Transcript p. 1892, line 18.

C. Instruction on unanimous verdict

The court also finds it objectionable that the verdict forms reflected a unanimity requirement in finding that the aggravating circumstances do not outweigh the mitigating circumstances. Again, this court has held repeatedly that requiring unanimity as to the results of the weighing process does not offend due process. *Roe, 2002 U.S. App. LEXIS 22645, 2002 WL 31426248* at *5; *Coe, 161 F.3d at 338.*

It is difficult to say what the court's argument is at all. Its conclusion is that there is an "inescapable likelihood" that the jury in this case "understood the instructions to require unanimity in both its ultimate and interim conclusions . . . ." Page 12. However, there are only two places where a unanimity requirement has been held to be unconstitutional: (1) to reject the death penalty, and (2) as to the presence of a mitigating factor. Reviewing the instructions in total, there is not a word that would lead any reasonable juror to understand that unanimity was required in these two instances. The court would require that trial courts spell this out. Indeed, Ohio now requires its trial courts to instruct juries that one juror has the ability to block the death penalty. However, that is a matter of state law, not federal law. In fact, both this court and the Supreme Court "[have] chastised such instructions as encouraging deadlock and undermining the strong governmental interest in unanimous verdicts." *Roe, 2002 U.S. App. LEXIS 22645, 2002 WL 31426248* at *5 (quoting *Scott, 209 F.3d at 877); Scott, 209 F.3d* [*697] *at 877* (citing *Jones v. United States, 527 U.S. 373, 382-84, 144 L. Ed. 2d 370, 119 S. Ct. 2090 (2000)).*

The trial court correctly instructed the jury on mitigating and aggravating factors, in accordance with Ohio law at the time and with our court's cases, both before and since. These instructions occupied pages 1869-75 and 1881-90 of the transcript.

The trial court then began to explain the actual verdict forms. As is required by law, it noted that a verdict recommending death required unanimity as to the existence of aggravating factors, unanimously found by the jury (which it had already done, in its penalty phase determinations), that, in the opinion of each juror, outweighed the mitigating factors. The trial court had previously instructed the jury on finding mitigating factors, with no unanimity mentioned.

The trial court then explained the verdict forms recommending life imprisonment. Again, the trial court truthfully told the jury that such a *verdict* required each juror to agree to it. It would have been a falsehood for the judge to tell the jury that it could return a verdict recommending life with parole in 20 years, or life with parole in 30 years, without each juror signing that form.

That is all that the judge did; and he was completely truthful and legally correct in so doing. This discussion occupies 60 lines of transcript at pages 1890-92.

Finally, having concluded the discussion of the verdict forms, the judge simply reinforced the correct statement of the law that a verdict had to be unanimous. This use of the words "to reach a decision all twelve of you must be in agreement" was 70 lines n1 and a recess away from the instruction on finding and weighing mitigating factors, as opposed to the 17-word distance that the Third Circuit found acceptable, and wildly different from the 7-word distance that the court found unconstitutional in *Frey* (albeit before AEDPA and thus not under the more stringent standard established by that law).

n1 As is obvious from his final response (pages 12-13), Judge Merritt and I share a difference of opinion as to what is "the Ohio trial court's unanimity instruction regarding

mitigating factors." As I carefully explain above, the instructions are given at pages 1869-75 and 1881-90. The accurate recitation of the verdict forms occurs at transcript pages 1890-92. A correct reading of a constitutionally unexceptionable verdict form is not "an instruction."

As nearly as I can gather, the court's complaint is that the judge did not instruct the jury to the effect that "any one of you can prevent the imposition of the death penalty on this defendant, simply by refusing to sign the death verdict. You can do so for any reason or for no reason." While that is a correct statement of existential truth, no case, and certainly no Supreme Court case, has come close to requiring that such an instruction be given.

The court's opinion as to what a reasonable Ohio jury would believe from the instructions in this case is, in my opinion, a gross libel on the intelligence and understanding of those jurors. I therefore respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-4193

WILEY DAVIS, JR.,
Petioner-Appellant,

v.

BETTY MITCHELL, WARDEN,
Respondent-Appellee.

Filed: April 25, 2003

Before: MERRITT, BOGGS, and MOORE, Circuit Judges.

COUNSEL

For Wiley Davis, Jr. Petitioner - Appellant: John Patrick Parker, Cleveland, OH. Laurence E. Komp, Baldwin, MO. For BETTY MITCHELL, Warden, Respondent - Appellee: Charles L. Wille, Attorney General's Office of Ohio, Capital Crimes Section, Columbus, OH.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Boggs would grant rehearing for the reasons stated in his dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:99-CV-1649

WILEY DAVIS, JR.,
Petitioner,

v.

BETTY MITCHELL, WARDEN,
Respondent.

Decided and Entered: August 23, 2000

Before: James S. Gwin, United States District Judge.

COUNSEL

John P. Parker, Cleveland, Ohio; Patricia A. Millhoff, Akron, Ohio; Charles L. Wille, Mathew J. Lampke, Office of the Attorney General, Columbus, Ohio; Jon W. Oebker, Office of the Attorney General, Cleveland, Ohio.

OPINION BY: James S. Gwin

OPINION

In this death penalty case, Petitioner Wiley Davis, Jr., petitions for a writ of habeas corpus. In support of his

petition, Davis says constitutional error attended his conviction and resulting death sentence.

Respondent Warden Betty Mitchell says Petitioner Davis is not entitled to a writ of habeas corpus. First, Respondent Mitchell maintains that Petitioner Davis has procedurally defaulted many of his claims for relief. With regard to the remaining claims, Respondent Mitchell argues that Petitioner Davis either fails to show any constitutional violation or raises claims not cognizable on habeas review.

For the reasons set forth below, the Court finds that Petitioner Davis has failed to establish his right to a writ of habeas corpus. Accordingly, the Court denies Davis's petition.

I. Overview

In evaluating the petition, the Court first describes the facts relating to Petitioner Davis's crime of conviction. Second, the Court reviews Davis's direct appeals and attempts to receive post-conviction relief. Third, the Court decides whether Davis has exhausted his state remedies and has procedurally defaulted any of his grounds for relief. Fourth, the Court considers Davis's request for an evidentiary hearing. Fifth, the Court sets forth the standard of review applicable to Davis's petition. Finally, the Court substantively reviews Davis's grounds for relief.

II. Factual Background

Currently, Petitioner Wiley Davis awaits execution for the murder of Amy Perkins. A jury found that Davis murdered Perkins on November 26, 1991, shortly after kidnapping her from a downtown Cleveland parking lot.

On that date, Davis was observed at the kidnapping scene at 8:15 a.m. At a downtown Cleveland parking lot, parking lot patron Mattie Baker observed Davis pacing back and forth in the parking lot as she parked her car. By the time Baker exited her car, Davis was no longer in sight.

Having forgotten her parking space number, Baker soon returned to her vehicle. As she returned, Baker saw Davis sitting in the driver's seat of the car parked next to her vehicle. Baker described the car as a small gray Toyota with Texas license plates. Amy Perkins owned the vehicle. Baker testified that a white female sat in the passenger's seat of the car. The female had a "terrified look" on her face, prompting Baker to seek help. However, the car left the parking lot before Baker was able to find any assistance.

Within an hour of Baker's encounter with Davis, Gwendolyn Brice saw Amy Perkins's car sitting at a stop sign near Brice's home. She saw a woman in the car motion as if to push something away just before a "pop" sound emanated from the vehicle. Brice then saw the passenger side window shatter and the woman's head drop.

Shortly thereafter, Marjorie Johnson arrived at Brice's house and parked behind Perkins's car. Johnson saw a black male in the driver's seat and a white female in the passenger's seat. The female's head was hanging out of the window. Upon seeing Johnson, the driver pulled away at a high rate of speed.

Nancy Brown next spotted Perkins's vehicle as she waited with her son and his friends for their school bus to arrive. Brown the car cross the intersection near the bus stop while the driver struggled to close the passenger's door.

After the car passed, the children told Brown they saw someone lying in some nearby bushes. Brown ran to the

bushes, where she discovered a nude white female struggling to speak. After calling 911 from a house in the area, Brown covered the woman with a borrowed blanket.

The ambulance arrived and took the woman to the hospital, where she eventually died. David Perkins later identified the woman as his wife, Amy Perkins.

Soon after the shooting, the police located Amy Perkins's gray Toyota in the parking lot of a deli. The car contained shattered glass and fresh blood. Approximately five to ten feet from the driver's side of the car, the police recovered a Federal .32 caliber shell casing. Inside the car, the police found Amy Perkins's clothing, checkbook, and some personal items. They appeared to have been rifled through.

Later that morning, Petitioner Davis appeared at his sister's house. Davis's sister lived approximately three hundred yards from the Toyota's final location. After coming into his sister's house, Davis told his sister and her boyfriend that he had accidentally shot someone during an altercation. He then asked his sister's boyfriend, Alfonso Herring, Jr., to give him a change of clothes and to hide his gun. Herring agreed. After changing out of his blood-stained sweatsuit, Davis left his sister's home at 9:40 a.m.

A few hours later, Cleveland police officers arrested Davis at his girlfriend's house. A search of the house uncovered a box of Federal brand .32 caliber ammunition and a blood-stained right shoe. Herring later gave to the police Davis's gun and the clothes Davis had worn on the morning of Amy Perkins's murder.

Firearm testing showed that the gun Davis gave to Herring had fired the casing found in the deli parking lot. And the Cuyahoga County Coroner's Officer identified the

blood stains on Davis's shoe and sweatsuit as Type O—the same type as Amy Perkins.

Regarding the state's later claim that Amy Perkins was murdered during the course of a robbery, the police did not recover any jewelry from the car or Perkins's body. However, David Perkins testified that his wife always wore a custom-made engagement wedding ring and a Rolex watch. He said these items had been missing since Amy's death.

On December 5, 1991, the Cuyahoga County Grand Jury indicted Davis on a six-count indictment. The first two counts charged aggravated murder under Ohio Revised Code § 2903.01(A) and (B). Each count carried three felony—murder capital specifications-kidnapping, aggravated robbery, and rape or attempted rape. The remaining counts charged kidnapping n1, rape n2, aggravated robbery n3, and having a weapon while under a disability. n4

n1 *See* OHIO REV. CODE § 2905.01.
n2 *See* OHIO REV. CODE § 2907.02.
n3 *See* OHIO REV. CODE § 2911.01.
n4 *See* OHIO REV. CODE § 2923.13.

Davis was tried before the Cuyahoga County Court of Common Pleas. The jury convicted Davis on all counts and all specifications thereto. Following the jury's recommendation, the trial court sentenced Davis to death. The court also ordered Davis to spend the twenty-sixth day of each month in solitary confinement until his execution.

III. Procedural Background

Following his conviction, Petitioner Davis appealed to the Cuyahoga County Court of Appeals. In 1995, the appellate court affirmed Davis's conviction, and set aside

only that portion of Davis's sentence calling for his placement in solitary confinement on the anniversary of Amy Perkins's death.

After the Cuyahoga County Court of Appeals affirmed his conviction, Petitioner Davis sought review with the Ohio Supreme Court, In 1996, the Ohio Supreme Court affirmed both Davis's conviction and sentence.

Davis next filed a state-court petition for post-conviction relief. After the state trial court denied the petition, Davis sought review with the Cuyahoga County Court of Appeals. In 1998, the appellate court affirmed the trial court's decision. Davis then filed an appeal with the Ohio Supreme Court. The Ohio Supreme Court declined to exercise jurisdiction.

On January 7, 2000, Davis filed his petition for a writ of habeas corpus. The Court now considers his petition.

IV. Exhaustion and Procedural Default

1. Exhaustion

A habeas corpus petitioner must exhaust his available state remedies before petitioning for a writ of habeas corpus. *See 28 U.S.C. § 2254*(b). To determine whether the exhaustion requirement is met, the Court examines whether the petitioner "has the right under the law of the State to raise, by any available procedure, the question presented." *28 U.S.C. § 2254*(c).

As explained in Part II, Petitioner Davis has pursued all opportunities for relief at the state level, both on direct appeal and in post-conviction proceedings. Petitioner Davis has thus exhausted available state court remedies.

2. Procedural Default

Federal courts "will not review questions of federal law decided by a state court if the decision of that court rests upon a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson, 501 U.S. 722, 729, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991).* Applied to the habeas context, this doctrine stops federal court review of claims that a state court has declined to address because of the petitioner's noncompliance with a state procedural requirement. *See Wainwright v. Sykes, 433 U.S. 72, 87, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977).* "In these cases, the state judgment rests on independent and adequate state procedural grounds." *Coleman, 501 U.S. at 730.*

The United States Court of Appeals for the Sixth Circuit has established a four-step analysis to determine whether a claim has been procedurally defaulted. *See Maupin v. Smith, 785 F.2d 135 (6th Cir. 1986).* Under this test, the Court must determine (1) whether the petitioner failed to comply with an applicable state procedural rule; (2) whether the state courts actually enforced the state procedural sanction; (3) whether the state procedural bar is an "adequate and independent" state ground on which the state can foreclose federal review; and, if the previous elements are met, (4) whether the petitioner has demonstrated "cause" and "prejudice." *Id.*

Respondent Mitchell contends that Petitioner Davis has procedurally defaulted Claims for Relief 2, 4 (PP 18-29), 5, 8, 12 (PP85-90), 18 and 19. According to Respondent Mitchell, Davis never presented Claim 12 (P 86) to the state courts, and thus is barred from pursuing this claim in his habeas petition. Respondent Mitchell says the remaining claims are barred by either Ohio's contemporaneous objection rule or the doctrine of *res judicata*. The Court considers each of these arguments in turn.

1. Claims Never Presented to State Courts

Respondent Mitchell states that Claim 12 (P86) was never raised in state court. The Court finds that the arguments made in both P 86 and P 91 of Claim 12 are barred.

In P 86, Petitioner Davis argues that the prosecution "elicited testimony designed to inflame and prejudice the jury when the jury was advised that the victim's husband had requested, and was granted the opportunity to speak face to face with the defendant." After reviewing Davis's direct appeals, the Court finds that Davis has raised this argument for this first time in his habeas petition.

In P 91, Petitioner Davis says the prosecution "improperly argued that the juries [sic] verdict was only a recommendation in an effort to lead the jury to believe that the responsibility for determining the appropriateness of a death sentence rests elsewhere." Davis did not raise this argument on direct appeal. Davis argued only that the trial court improperly instructed the jury as to its advisory role in recommending a penalty; he never claimed the prosecution made any improper argument regarding the jury's role.

Ordinarily, issues raised for the first time in a habeas corpus petition are remanded to the state court. However, Petitioner Davis is barred from presenting these arguments in state court because he had the opportunity, but failed to do so, during his state court proceedings. *See State v. Perry, 10 Ohio St. 2d 175, 179, 226 N.E.2d 104, 107 (1967)* (holding that a constitutional issue cannot be considered in post-conviction proceedings where they have already been or could have been fully litigated before judgment of conviction or on direct appeal from that judgment).

A claim not originally brought in state court that in turn has no state court remedy is procedurally barred. *See Riggins v. McMackin, 935 F.2d 790 (6th Cir. 1991).* Accordingly, the Court finds that the arguments raised in P 86 and P 91 of Claim 12 are procedurally defaulted. n5

n5 Even if not barred, these claims lack merit. The Court finds nothing inflammatory in the prosecution's remarks about David Perkins's face-to-face meeting with Petitioner Davis. This comment in no way infected Davis's trial with sufficient prejudice as to deny Davis due process. *See Darden v. Wainwright, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 106 S. Ct. 2464 (1986).*

And contrary to Davis's contention in P 91, the trial court properly instructed the jury regarding its advisory role in sentencing Petitioner Davis. The court merely informed the jury that the trial court would ultimately sentence Davis. This is an accurate statement of Ohio law. *See* OHIO REV. CODE § 2929.03(D)(3). Such an instruction does not run afoul of the Constitution.

2. Contemporaneous Objection Rule

Respondent Mitchell argues that Claim 2 and portions of Claim 12 (PP 87-90) are procedurally defaulted under Ohio's contemporaneous objection rule. The Court finds that all but Claim 12 (P 88) are barred.

Under Ohio's contemporaneous objection rule, an appellant who fails to either object or request a specific instruction at trial waives later review of the issue unless he shows plain error. *See State v. Smith, 89 Ohio St. 3d 323, 332, 731 N.E.2d 645, 655 (2000).* Plain error involves an error that so adversely affects the rights of the accused "as to

undermine the fairness of the guilt-determining process." *State v. Swanson, 16 Ohio App. 3d 375, 377, 476 N.E.2d 672, 675 (Ohio Ct. App. 1984).*

The Ohio Supreme Court found that Davis had failed to raise a timely objection with regard to the allegations he sets forth in Claim 2 and all but one of the allegations he raises in Claim 12 (PP 87-90). The court then reviewed Davis's claims for plain error and found no error so serious that it undermined the fairness of Davis's trial.

"Default imposed for failure to object contemporaneously . . . is an adequate and independent state ground to bar federal habeas review absent a showing of cause and prejudice." *Scott v. Mitchell, 209 F.3d 854, 867 (6th Cir. 2000)* (citing *Engle v. Isaac, 456 U.S. 107, 124-29, 71 L. Ed. 2d 783, 102 S. Ct. 1558 (1982)).* Petitioner Davis has made no attempt to show either cause or prejudice regarding his failure to raise contemporaneous objections at trial. Thus, Claims 2 and 12 (PP87 and 89-90) are procedurally defaulted. n6

n6 Again, these claims would not avail Petitioner Davis in any event. In Claim 2, Davis takes issue with the wording of one of the counts in the indictment. Count two charges Davis with killing Perkins in connection with the commission of "Kidnapping and/or Aggravated Robbery and/or Attempted Rape." According to Davis, the use of the disjunctive led the jury to believe it did not have to unanimously find Davis committed one of the listed felonies.

But the Ohio Supreme Court convincingly explained why the alleged wording error was not outcome-determinative:

Although Count Two was worded disjunctively, both it and Count One carried a separate felony-murder specification for each of the felonies alleged. The jury convicted Davis of

each specification individually. The jury also separately convicted Davis of kidnapping (Count Three) and aggravated robbery (Count Four). Because the jury made a separate, unanimous finding of guilt as to each of the predicate felonies, there is no plain error.

State v. Davis, 76 Ohio St. 3d 107, 118, 666 N.E.2d 1099, 1109 (1996).

Davis also argues in Claim 2 that the trial court should not have imposed the death penalty without the jury first finding that he acted with premeditation or that he was the principal offender. *See* OHIO REV. CODE § 2929.04(A)(7). However, in finding Davis guilty of aggravated murder, the jury necessarily concluded Davis acted with prior calculation and design. And in the absence of any evidence suggesting that a second actor participated in committing the aggravated murder, the jury's guilty verdict includes a finding that Davis acted as the principal offender.

In Claim 12 (P 87), Davis contends that the prosecution inflamed the jury by stating that Perkins's husband had to live with his wife's horrible death. This comment, even if improper, did not infect the trial with such extensive unfairness so as to deny Davis his due process rights. *See Wainwright, 477 U.S. at 181.*

In Claim 12 (PP 89, 90), Davis says the prosecution improperly argued nonstatutory aggravating factors. Though perhaps a violation of state law, the prosecution's comments do not run afoul of federal law. And absent a violation of federal law, Davis is not entitled to habeas relief. *See Estelle v. McGuire, 502 U.S. 62, 67, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991).*

Respondent Mitchell also contends that Petitioner Davis has procedurally defaulted Claim 12 (P 88). In this ground for relief, Davis alleges "the prosecutor improperly argued that the wound in the victim's head was so large and the day so cold that one could see steam flowing from her head." The Ohio Supreme Court found that Davis had objected to this comment at trial and proceeded to review the claim on its merits. Thus, Claim 12 (P 88) is preserved for habeas review.

3. *Res Judicata*

Respondent Mitchell states that Claims 4 (PP 18, 27, and 29), 5, 8, 12 (P 85), 18, and 19 are barred based on the doctrine of *res judicata*. In response, Petitioner Davis argues only that *res judicata* is not an adequate and independent ground to bar federal habeas review. The Court disagrees.

Under Ohio law, an issue which is not raised by a petitioner on direct appeal is subsequently barred based on the doctrine of *res judicata*. *See, e.g., State v. Combs, 100 Ohio App. 3d 90, 97, 652 N.E.2d 205, 209 (Ohio App. Ct. 1994)* (holding that post-conviction relief is not available for claims that could have been raised on direct appeal based on *res judicata.); Perry, 10 Ohio St. 2d at 177, 226 N.E.2d at 106* (syllabus). Such issues are considered waived for federal habeas purposes. *See Norris v. Schotten, 146 F.3d 314, 332 (6th Cir. 1998)* (quoting *Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994)).*

Challenging this authority, Petitioner Davis says *res judicata* is not an "adequate" ground for foreclosing habeas review. Davis claims that *res judicata* is not adequate because Ohio courts do not consistently apply the rule in capital cases. This argument is incorrect.

The Sixth Circuit has recognized *res judicata* as an independent and adequate ground upon which to stop

consideration of habeas claims. *See Schotten, 146 F.3d at 332; Wong v. Money, 142 F.3d 313, 322 (6th Cir. 1998).* Ohio's "abundance of caution" in capital cases does not imply that this Court may ignore Ohio's "sovereign decision founded upon its own procedural rule." *Mitchell, 209 F.3d at 869; see also Amos v. Scott, 61 F.3d 333, 342 (5th Cir. 1995)* (stating that "an occasional act of grace by a state court in excusing or disregarding a state procedural rule does not render the rule inadequate. . .").

Petitioner Davis next argues that *res judicata* should not foreclose federal review in that "Ohio's post-conviction bar of res judicata does not meet the due process requirements because it is designed to create procedural defaults for the sake of judicial convenience." Yet Davis does not offer any coherent argument as to how Ohio's use of *res judicata* runs afoul of due process.

Accordingly, the Court finds that *res judicata* is an "'adequate and independent' state ground on which the state can rely to foreclose review of a federal constitutional claim." *Maupin, 785 F.2d at 138.* Claims 4 (PP 18, 27, and 29), 5, 8, 12 (P85), 18, and 19 are thus barred. n7

n7 Like Petitioner Davis's other defaulted claims, these claims lack merit. In Claims 4 (PP 18, 27, and 29), 5, 8, and 12 (P 85), Davis argues that his counsel provided ineffective representation. But Davis does not show any actual prejudice. The overwhelming evidence of Davis's guilt strongly suggests any error on the part of his counsel did not render the jury's guilty verdict unreliable. Likewise, the Court remains unconvinced that Davis's counsel made errors so serious during the mitigation phase so as to render the jury's death penalty recommendation invalid. *See Strickland v. Washington, 466 U.S. 668, 685, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).*

In Claim 18, Davis says the prosecution failed to provide discovery regarding a log book from the Blue Cross building located near the scene of the kidnapping. Davis insists this log book contains a description of another suspect. The prosecution's failure to produce the log book, according to Davis, violates the Supreme Court's holding in *Brady v. Maryland*, where the Court held that the prosecution must produce evidence that is favorable to the defendant when such evidence is material to guilt or punishment. *373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*. Yet Davis has not offered any evidence showing a "reasonable probability" that the outcome of his trial would have been different had the prosecution produced the log book. *United States v. Bagley, 473 U.S. 667, 678, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)*. Absent such evidence, Davis cannot establish a *Brady* violation.

In Claim 19, Davis contends that death by electrocution constitutes cruel and unusual punishment. But neither the Supreme Court nor the Sixth Circuit have ever held as much. In the absence of any supporting authority, Davis's argument fails.

V. Evidentiary Hearing

Petitioner Davis asks this Court to delay ruling on his petition in order to "conduct a hearing at which proof may be offered concerning the allegations of this petition . . . ." However, Davis offers no argument in support of his request. And the Court's independent review reveals no basis for conducting an evidentiary hearing.

To show entitlement to an evidentiary hearing, a petitioner must overcome two obstacles. First, if the petitioner failed to develop the factual basis of his claim in state court, a federal habeas court is generally prohibited from conducting an evidentiary hearing. n8 *See 28 U.S.C.*

§ 2254(e)(2). Second, even if he did not fail to develop the factual basis of his claim, a petitioner must still show that there is a factual dispute that "if resolved in the petitioner's favor, would entitle [the petitioner] to relief and [that] the state has not afforded the petitioner a full and fair hearing." *Murphy v. Johnson, 205 F.3d 809, 815 (5th Cir. 2000); see also Townsend v. Sain, 372 U.S. 293, 313, 9 L. Ed. 2d 770, 83 S. Ct. 745 (1963)* ("Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in state court . . . ."), *overruled on other grounds by Keeney v. Tamayo-Reyes, 504 U.S. 1, 118 L. Ed. 2d 318, 112 S. Ct. 1715 (1992).*

n8 When a petitioner has failed to develop the factual basis of his claim, the AEDPA allows a court to conduct an evidentiary hearing only if the petitioner shows that:

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

Here, the Court finds no material factual dispute requiring an evidentiary hearing. The record before the Court provides a complete basis upon which to consider Petitioner

Davis's grounds for relief. Thus, even assuming Davis did not fail to develop the factual basis of his claim and that the state courts denied Davis a full and fair hearing, an evidentiary hearing is not appropriate.

VI. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") sets forth the standard with which this Court reviews Petitioner Davis's petition. The AEDPA provides in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Here, Petitioner Davis does not challenge the state court's factual findings. Thus, the standard of review described in § 2254(d)(1), rather than § 2254(d)(2), applies to his petition.

The United States Supreme Court recently examined the applicability of § 2254(d)(1). In *Williams v. Taylor*, the Court identified the different circumstances in which a federal habeas court must apply either the "contrary to" or the "unreasonable application of" clause in § 2254(d)(1):

Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

529 U.S. 362, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389 (2000).

Here, Petitioner Davis does not challenge the state court's articulation of the applicable legal principles. Instead, Davis seeks review of the state court's application of those principles to the facts of his case. Thus, the Court will review Davis's petition under § 2254(d)(1)'s "unreasonable application" clause.

Until *Williams*, federal courts generally applied a subjective standard of reasonableness under the "unreasonable application" clause. For instance, the Sixth Circuit has held that a writ of habeas corpus "will issue if the unreasonableness of the state court's application of clearly-established precedent is not debatable among reasonable jurists." *Tucker v. Prelesnik, 181 F.3d 747, 753 (6th Cir. 1999).*

However, in *Williams*, the Supreme Court rejected this approach. Rather than declare an application of law reasonable simply because one jurist has employed a similar application, the Court endorsed an objective standard for assessing a state court's application of controlling precedent. *See Williams, 120 S. Ct. at 1521.*

Thus, the Court's review of Petitioner Matthews's petition is not *de novo*. Rather, the Court will determine whether the state court's application of law is objectively reasonable.

VII. Grounds for Relief

The Court now reviews Petitioner Davis's grounds for relief. As explained below, the Court finds that Davis fails to show the state courts' application of controlling law is in any way unreasonable.

A. Claim 1

Petitioner Davis first contends that the trial court wrongly refused to move his trial to a venue not "permeated" with pretrial publicity. Davis insists that excessive pretrial publicity deprived him of his constitutional right to a fair trial.

Under certain circumstances, pretrial publicity can deprive a defendant of his right to a fair trial. Specifically, the United States Supreme Court has held that pretrial publicity undermines the fairness of the judicial process when it is either "inherently prejudicial" or when it results in "actual prejudice."

Publicity surrounding a judicial proceeding is inherently prejudicial when it fosters a circus-like atmosphere in the courtroom, draining the proceeding of the "solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob." *Murphy v. Florida, 421 U.S. 794, 799, 44 L. Ed. 2d 589, 95 S. Ct. 2031 (1975).* For example, in *Rideau v. Louisiana*, the Supreme Court found such inherent prejudice when a local television station aired a twenty-minute videotaped interrogation during which the defendant

confessed to the crime for which he was eventually convicted. *373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963).*

Even if not so egregious as to create inherent prejudice, pretrial publicity may nevertheless give rise to an inference of actual prejudice. The nature and extent of pretrial publicity may have such a substantial effect on prospective jurors, as evidenced by the voir dire testimony, that a "fair trial [was] impossible." *Murphy, 421 U.S. at 798.* In *Irvin v. Dowd*, the United Supreme Court found extensive coverage of a defendant's past convictions and his offer to plead guilty to avoid a death sentence prevented a fair trial when nearly all of the prospective jurors reported some belief in the defendant's guilt. *366 U.S. 717, 727, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).*

Here, Petitioner Davis insists that pretrial publicity rendered his trial unfair. Davis says that near constant media coverage of the murder of Ar.y Perkins, whose husband was a popular radio personality in Cleveland, tainted the venue in which he was tried and convicted. This coverage, according to Davis, included "information about [his] prior criminal record, other attempted rapes in downtown Cleveland and general information about the lack of safety in the downtown area." Davis says the media coverage was so pervasive that only seven of the seventy potential jurors reported no previous knowledge regarding the case.

The Ohio Supreme Court considered and rejected Petitioner Davis's argument. The court found no merit in Davis's claim of inherent prejudice. Although pretrial publicity included coverage of Davis's criminal record, the court observed that this alone would not give rise to a presumption of prejudice. And as for actual prejudice, the

court emphasized the trial court's careful screening of potential jurors and exclusion of those jurors who had formed fixed opinions as to Davis's guilt.

The Court finds that the Ohio Supreme Court reasonably applied controlling precedent. The court correctly noted that publication of a defendant's prior convictions will not, in and of itself, create inherent prejudice. And other grounds for finding inherent prejudice are lacking. Davis's trial was in no way the carnival-like exercise described in *Rideau*.

Nor is there any support for a finding of actual prejudice. The trial court took various measures to ensure that pretrial publicity would not prejudice Petitioner Davis's trial. For example, the court granted a continuance to allow the pretrial publicity to wane. Thus, while the majority of the publicity occurred in November and December 1991, the trial did not take place until May 1992.

Further, the trial court made reasonable efforts to ensure the jurors selected to hear Davis's case were not biased against him. The trial court individually questioned many jurors as to the impact of the pretrial publicity. The broad majority of prospective jurors had only vague recollection of reports of the killing. The court excused the few jurors who had formed fixed opinions as to Davis's guilt. Also, the court appointed a jury selection specialist to assist Davis in choosing a favorable jury.

In his petition for habeas corpus relief, Petitioner Davis shows no evidence that members of the venire had knowledge or beliefs that prevented them from fairly deciding his case upon the evidence presented at the trial. *See Dobbert v. Florida, 432 U.S. 282, 303, 53 L. Ed. 2d 344, 97 S. Ct. 2290 (1977)* (rejecting claim of prejudice where petitioner failed to show "constitutional unfairness as to the method of jury selection or as to the character of the jurors

actually selected"). Absent such a showing, the Constitution "presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case." *Lockhart v. McCree, 476 U.S. 162, 184, 90 L. Ed. 2d 137, 106 S. Ct. 1758 (1986); Ross v. Oklahoma, 487 U.S. 81, 86, 101 L. Ed. 2d 80, 108 S. Ct. 2273 (1988).*

Petitioner Davis can show only that some of the veniremen were familiar with the case. But "qualified jurors need not . . . be totally ignorant of the facts and issues involved." *Dobbert, 432 U.S. at 302.* Davis presents no evidence suggesting that any of the jurors ultimately seated had any opinion as to his guilt. Indeed, Davis never challenged any of these jurors for cause, and used only half of his peremptory challenges.

Accordingly, the Court finds no merit in Claim 1.

B. Claim 3

Petitioner Davis next says the jury did not have sufficient evidence to find him guilty of the aggravated robbery specification. He thus says his conviction violated his rights under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.

A federal court can overturn a state jury decision only in certain circumstances. The United States Court of Appeals for the Sixth Circuit has held that a verdict must stand if "after viewing the evidence (and the inferences to be drawn therefrom) in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Walker v. Russell, 57 F.3d 472, 475 (6th Cir. 1995).* Thus, the federal court's

job in reviewing a petition for habeas corpus is not to re-evaluate the evidence and reach its own conclusion, but instead to review the record and determine whether a reasonable jury could find all of the elements necessary to prove the crime beyond a reasonable doubt. *See Jackson v. Virginia, 443 U.S. 307, 318-19, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).*

Petitioner Davis says that no reasonable juror could reach the conclusion that he robbed Amy Perkins during her kidnapping and murder. Davis says that no reasonable jury would credit David Perkins's testimony that his wife "habitually wore" the missing ring and watch. Also, Davis points out that no one directly testified that Perkins wore the ring and watch on the day of her death, only that Perkins's body was not wearing the ring and the watch and they were never found in her house. Consequently, Davis says that the lack of direct evidence proving that Perkins wore the missing ring and watch is enough to remove the aggravated robbery specification from his conviction.

The Ohio Supreme Court rejected Davis's argument and upheld the jury's verdict. The court held that the jury made reasonable inferences from the evidence presented. From the testimony at trial, the jury inferred that Perkins was wearing the missing ring and watch at the time of her murder. Presumptively, the jury made this finding in reliance upon Amy Perkins's husband's testimony that she always wore these items. Combined with the fact that the ring and watch were never recovered, and the testimony that Perkins's car was "rifled through," the court determined that the jury reached a reasonable conclusion that Davis stole the items. Although the evidence was circumstantial, the court noted that circumstantial evidence is given the same weight as direct evidence.

This Court finds the Ohio Supreme Court's ruling reasonable. The prosecution presented evidence that (1) Perkins habitually wore the ring and watch, (2) the belongings in Perkins's car were rifled through, (3) Perkins was not wearing any jewelry when found, and (4) the items are still missing. This convincing circumstantial evidence allowed a reasonable jury to infer that Davis stole the items. *See U.S. v. Farley, 2 F.3d 645, 650 (6th Cir. 1993)* (stating that "circumstantial evidence is entitled to the same weight as direct evidence in this calculus [of determining sufficiency").

Hence, the Court rejects Claim 3.

C. Claims 6, 7, 9, 10

Petitioner Davis raises several claims regarding alleged deficiencies with Ohio's post-conviction procedures. Specifically, Davis says his constitutional rights were violated during the state post-conviction process when the trial court prevented Davis from interviewing jurors, refused an evidentiary hearing, and administered what Davis claims was a "meaningless" post-conviction procedure.

The Sixth Circuit has ruled that a petitioner may not seek habeas relief based on alleged deficiencies in a state's post-conviction procedures. *See Kirby v. Dutton, 794 F.2d 245 (6th Cir. 1986).* Rather, a petitioner is entitled to habeas relief only upon showing that an error of federal law makes his conviction and resulting incarceration illegitimate. *See id. at 247* (observing that a petition for a writ of habeas corpus is "not the proper means by which prisoners should challenge errors or deficiencies in state post-conviction proceedings . . . because the claims address collateral matters and not the underlying state conviction giving rise to the prisoner's incarceration").

In *Kirby*, the prisoner filed a petition for habeas corpus on the grounds that he had inadequate assistance of counsel at his post-conviction hearing. *See id. at 246*. The Sixth Circuit ultimately denied the petitioner's appeal because his claim related to his state post-conviction proceeding rather than his actual incarceration. *See id. at 247*. The court emphasized that an error associated with a state post-conviction proceeding is not cognizable on habeas review:

> Even where there may be some error in state post-conviction proceedings, this would not entitle appellant to federal habeas corpus relief since appellant's claim here represents an attack on a proceeding collateral to detention of appellant and not on the detention itself.

Id. (quoting *Williams v. Missouri, 640 F.2d 140 (8th Cir. 1981)).*

The claims that Petitioner Davis makes in Claims 6, 7, 9, and 10 all relate to alleged constitutional errors during his state post-conviction proceeding. As such, these claims are not cognizable on federal habeas review. Accordingly, the Court rejects these four claims for relief.

D. Claim 11

Petitioner Davis contends that the trial court deprived him of a fair trial by improperly instructing the jury regarding the appropriate aggravating factors to consider in deciding whether to recommend the death penalty. In particular, Davis says the trial court erred in referring to the specifications in the indictment as "aggravating circumstances."

The Ohio Supreme Court rejected Petitioner Davis's argument without opinion. Likewise, on direct appeal, the Cuyahoga County Court of Appeals found that any error in

the instructions did not actually prejudice Davis. n9 The Court finds nothing unreasonable in the state courts' rejection of Davis's claim.

n9 *See Ylst v. Nunnemaker, 501 U.S. 797, 803, 115 L. Ed. 2d 706, 111 S. Ct. 2590 (1991)* (stating that "where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon that ground").

Ohio Revised Code § 2929.04(A) sets forth various aggravating circumstances a jury must consider in deciding whether to recommend the death penalty. Some of these aggravating circumstances were included as specifications in Petitioner Davis's indictment. However, the firearm specification in Davis's indictment is not listed as an aggravating factor in Ohio Revised Code § 2929.04(A).

Thus, the trial court erred when it referred to the specifications in the indictment as "aggravating circumstances." Davis says this error resulted in actual prejudice. According to Davis, the trial court's instruction led the jury to consider a nonstatutory aggravating factor in deciding whether to recommend the death penalty.

As an initial matter, Davis fails to show how the trial court's error in instructing the jurors on state law gives rise to a federal constitutional violation. The simple fact that the instructions may have led the jurors to consider nonstatutory aggravating circumstances does not establish such a violation. In *Zant v. Stephens*, the United States Supreme Court found that a jury may consider nonstatutory aggravating factors in deciding which defendants receive the death penalty:

Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.

462 U.S. 862, 878, 103 S. Ct. 2733, 77 L. Ed. 2d 235.

Even if Petitioner Davis's argument raised a federal constitutional issue, the Court finds reasonable the Ohio Supreme Court's conclusion that the trial court's error did not result in any prejudice to Davis. Prior to the penalty phase, the trial court properly instructed the jury as to aggravating circumstances the jury should consider in deciding whether to recommend that Petitioner Davis receive the death penalty. These instructions remedied any earlier misstatement by the trial court.

For this reason, the Court rejects Claim 11.

E. Claim 12 (P 88)

Petitioner Davis says he was denied his constitutional right to a fair trial because of certain inappropriate comments made by the prosecution during closing arguments. In particular, Davis says the prosecution made inflammatory comments regarding the gruesome nature of Amy Perkins's murder.

A prosecutor's improper comments can deprive a defendant of a fair trial. *See Wainwright, 477 U.S. at 181.* But such a deprivation does not occur simply because a

prosecutor's comments are "undesirable or even universally condemned." *Id.* (internal quotations omitted). Instead, the relevant inquiry "is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* (quoting *Donnelly v. DeChristoforo, 416 U.S. 637, 642, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974)).*

The Ohio Supreme Court found no merit in Petitioner Davis's argument regarding the prosecution's statements concerning Amy Perkins's death. The court acknowledged that the prosecution ought not have made comments emphasizing the gruesome nature of the crime. However, the court concluded that, in light of the evidence supporting Davis's guilt, the prosecution's statements did not have a prejudicial effect.

The Court finds this conclusion reasonable. First, the prosecution's statements were not necessarily inflammatory. The prosecution noted that Amy Perkins's body had been dumped naked on the street. This reference supported the prosecution's claim that Petitioner Davis had attempted to rape Perkins. Also, the prosecution's comment regarding Perkins's head wound supported the theory that Davis shot Perkins at close range.

Second, the prosecution's comments did not so infect the trial with unfairness so as to deprive Petitioner Davis of due process. The jury's verdict finds substantial support in the evidentiary record. The Court finds no compelling reason to set this verdict aside.

The Court therefore rejects Claim 12 (P 88).

F. Claim 13

Petitioner Davis argues that Ohio appellate courts have failed to comply with their statutory duty to fully review the proportionality of death sentences, thereby depriving Davis of his rights under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution. Most notably, Davis says reviewing courts have failed to collect data regarding cases where capital defendants receive a life sentence.

The Ohio Supreme Court rejected this claim without opinion. The Cuyahoga County Court of Appeals also rejected this claim on direct appeal, noting that the Ohio Supreme Court has held that a proportionality review need only involve prior cases where the death penalty has been imposed.

The Court finds the state courts' rejection of Petitioner Davis's proportionality review claim reasonable. Davis is entitled to habeas relief only if he shows a violation of the Constitution or federal law. *See Estelle, 502 U.S. at 67.* However, the United States Supreme Court has held that a proportionality review of death sentences is not constitutionally required. *See Pulley v. Harris, 465 U.S. 37, 50-51, 79 L. Ed. 2d 29, 104 S. Ct. 871 (1984).* Therefore a petitioner is not entitled to habeas relief simply because of some inadequacy in a state-mandated proportionality review. As the Supreme Court made clear in *Harris*, a claim of inadequate proportionality review, "even if accurate, would not warrant issuing a writ of habeas corpus. Rather it would appear to be a matter that the state courts should consider, if they are so inclined, free of the constraints of the federal writ." *Id. at 42.*

The Court thus rejects Claim 13.

G. Claim 14

Petitioner Davis claims that Ohio's capital sentencing scheme violates the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. Davis raises several arguments in support of his claim.

The Ohio Supreme Court rejected Petitioner Davis's arguments without opinion. On direct appeal, the Cuyahoga County Court of Appeals relied upon Ohio Supreme Court precedent, and found these argument lacking in merit.

The state courts reasonably rejected Petitioner Davis's constitutional claim. Eschewing any citation to authority, Davis presents a variety of conclusory arguments concerning the constitutional infirmity of Ohio's capital sentencing scheme. That Davis's allegations lack both specificity and supporting authority is no surprise; federal courts have consistently rejected Davis's constitutional arguments.

For example, Petitioner Davis says Ohio's sentencing scheme unconstitutionally allows the execution of a defendant who lacked a specific intent to kill. However, the United States Supreme Court has found that the Constitution does not prevent the imposition of the death penalty where a defendant lacked an intent to kill. *See Tison v. Arizona, 481 U.S. 137, 157, 95 L. Ed. 2d 127, 107 S. Ct. 1676 (1987).*

Additionally, Petitioner Davis says Ohio's sentencing system unconstitutionally reduces the weight of any mitigating evidence by requiring jurors "to not consider sympathy and mercy." Yet the United States Supreme Court has already rejected this argument. In *California v. Brown*, the Court held that the trial court's admonition that jurors should not be swayed by sympathy did not interfere with the jury's consideration of mitigating evidence. *479 U.S. 538, 541, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987).*

Petitioner Davis also says Ohio's capital sentencing scheme violates the Constitution by creating a mandatory death penalty. But Ohio law does not provide for the automatic imposition of the death penalty for persons convicted of a particular crime. Instead, Ohio's sentencing scheme merely provides for the imposition of the death penalty when the aggravating circumstances of a particular crime outweigh any mitigating factors. Such an approach does not run afoul of the Constitution. *Cf. Woodson v. North Carolina, 428 U.S. 280, 301, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976)* (finding unconstitutional automatic imposition of death penalty for all defendants convicted of first-degree murder).

Petitioner Davis's remaining arguments are similarly lacking in merit. n10 Finding no constitutional defect in Ohio's capital sentencing scheme, the Court rejects Claim 14.

n10 These remaining arguments warrant limited discussion. First, Petitioner Davis says Ohio's sentencing system gives prosecutors too much discretion in making charging decisions. But Davis does not point to any particular defect in Ohio's system. The United States Supreme Court has made clear that a prosecutor's discretion in charging a defendant with a capital crime does not violate the Constitution. *See Gregg v. Georgia, 428 U.S. 153, 199, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976).* And the Sixth Circuit has likewise explained that prosecutorial discretion in making charging decisions is an inherent part of the criminal justice system. *See United States v. Talbot, 825 F.2d 991, 999 (6th Cir. 1987).*

Next, Petitioner Davis says Ohio unconstitutionally allows the same jury and same counsel to participate in both the guilt and penalty phases of a capital trial. Davis cites to no authority that would suggest this practice in any way

violates the Constitution. Nor can the Court discern any constitutional infirmity in allowing a single jury and the same counsel to complete an entire capital trial.

Petitioner Davis also insists that the Ohio's sentencing system provides insufficient guidance for the jury during its penalty phase recommendations. Yet Ohio Revised Code § 2929.04 sets forth, in considerable detail, the manner in which the jury should consider whether to recommend the death penalty. Davis offers no convincing argument as to how this statutory framework provides inadequate guidance.

Further, Petitioner Davis complains that Ohio does not provide a "mercy option" in capital cases. Davis offers no authority or argument suggesting that such an option is constitutionally required.

According to Petitioner Davis, Ohio's failure to ensure that the sentencer concludes the death penalty is the "only appropriate penalty" violates the Constitution. Yet, again, Davis provides no authority in support of his argument.

Petitioner Davis next contends that Ohio does not adequately narrow the category of defendants eligible to receive the death penalty. In particular, Davis argues that Ohio unconstitutionally allows an aggravating circumstance to repeat an element of the underlying offense. However, the United States Supreme Court has held that an element of an underlying offense may also constitute an aggravating circumstance for purposes of deciding whether to impose the death penalty. *See Lowenfield v. Phelps, 484 U.S. 231, 246, 98 L. Ed. 2d 568, 108 S. Ct. 546 (1988).*

Also, Petitioner Davis argues that Ohio unconstitutionally treats felony murder as a greater crime than premeditated

murder. But the Constitution does not limit the death penalty to those convicted of premeditated murder. *See Tison, 481 U.S. at 157.*

And finally, Petitioner Davis says Ohio's capital sentencing scheme unconstitutionally prevents a sentencer from considering all relevant mitigating evidence. Ohio's system does no such thing. Ohio Revised Code § 2929.04(B)(7) provides that the jury shall consider "any . . . factors that are relevant to the issue of whether the offender should be sentenced to death."

H. Claim 15

Petitioner Davis contends that the trial court improperly instructed the jury in violation of his rights under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution. Specifically, Davis insists that the trial court's penalty phase instructions were erroneous and thus rendered the jury's death penalty recommendation unreliable.

First, Davis says the trial court gave the jury an "acquittal first" instruction. In this argument, Davis claims the trial court informed the jury that it could consider other sentencing options only after first unanimously deciding against recommending the death penalty. This instruction, according to Davis, failed to notify each juror of his or her right to unilaterally prevent a death penalty recommendation.

The Ohio Supreme Court rejected this argument. The court reasoned that the trial court's instructions, when read as a whole, adequately informed the jury of the proper manner to deliberate and choose a penalty recommendation.

The Court finds the Ohio Supreme Court's analysis reasonable. The trial court's instructions, when read in their entirety, made clear that any single juror could prevent a

death penalty recommendation. Specifically, the court informed the jury that all twelve jurors must agree that the aggravating circumstances outweigh the mitigating circumstances before recommending that Petitioner Davis get the death penalty. This instruction, when coupled with the court's admonition that no juror should surrender her individual conscience and good judgment during deliberations, ensured that the jury understood the proper manner of reaching its penalty recommendation.

Second, Davis says the trial court erroneously used the statutory definition of "reasonable doubt" during its penalty phase jury instructions. Employing this definition, the trial court informed the jury that reasonable doubt is present when you "cannot say you are firmly convinced of the truth of the charge." Davis says the use of the word "charge" misled the jury into believing they could recommend the death penalty if they were convinced beyond a reasonable doubt that Davis committed the crime charged, without regard to the weighing of aggravating and mitigating factors.

The Ohio Supreme Court rejected this argument without opinion. The Cuyahoga County Court of Appeals also rejected this argument on direct appeal. The court refused to focus solely on the trial court's use of the word "charge," but rather construed the instructions as a whole. When so construed, the instructions, the court held, informed jurors that they must be firmly convinced that the aggravating circumstances outweigh any mitigating circumstances before recommending the death penalty.

This reasoning persuades. The trial court gave the jury extensive instructions regarding the weighing of relevant factors in deciding whether to recommend the death penalty. Davis's suggestion that the use of the word "charge" somehow led jurors to ignore these instructions is not credible.

Accordingly, the Court rejects Claim 15.

I. Claim 4 PP 30-34)

In this claim, Petitioner Davis says that his counsel ineffectively represented him at trial. Davis insists his counsel's deficient performance deprived him of his Sixth Amendment right to the effective assistance of counsel.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This provision recognizes the integral role the effective assistance of counsel plays in ensuring the adversarial system produces just results. *See Strickland, 466 U.S. at 685.*

A petitioner making an ineffective assistance of counsel claim must establish two elements. First, the petitioner must show that his counsel's performance was deficient. A constitutionally deficient performance occurs when counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* Second, the petitioner must show that his counsel's deficient performance resulted in actual prejudice. This type of prejudice arises when counsel's errors were "so serious as to deprive [Davis] of a fair trial, a trial whose result is reliable." *Id.*

The Ohio Supreme Court found that Davis did not make this showing. The court reasoned that, in light of the overwhelming evidence of Davis's guilt, any errors Davis's counsel may have committed did not actually prejudiced Davis's defense.

The Court finds the Ohio Supreme Court's reasoning persuasive. Petitioner Davis does not show that his counsel's performance rendered the jury's verdict unreliable.

Petitioner Davis first argues that his counsel performed deficiently by failing to preserve the arguments Davis makes in Claim 11, Claim 12 (P 88), Claim 16, and Claim 17. The Court has already rejected these arguments. For the reasons earlier given, Davis's attorney's failure to preserve these arguments did not result in any actual prejudice.

Petitioner Davis also argues that his attorney should have objected to the prosecution's comments regarding his unsworn statement. During closing argument, the prosecution noted that Davis's unsworn statement was not subject to cross-examination. Davis insists that this statement was improper.

Yet Petitioner Davis does not point to any authority that limits a prosecutor's comments regarding an unsworn statement's lack of cross-examination. Counsel's failure to object to a permissible statement does not constitute deficient representation.

Accordingly, the Court rejects Claim 4 (PP 30-34).

J. Claim 16

Petitioner Davis contends that the trial court violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution by failing to properly weigh the aggravating circumstances against the relevant mitigating circumstances.

The Ohio Supreme Court rejected this claim. The Court found that any possible errors in the trial court's consideration of the relevant aggravating and mitigating

circumstances were remedied by its independent review of Davis's death sentence. Finding little in the way of mitigating evidence, the court found Davis's death sentence appropriate.

The Court finds the Ohio Supreme Court's analysis reasonable. The United States Constitution does not require a court to weigh aggravating and mitigating circumstances prior to imposing the death penalty. Of course, the Constitution does prohibit irrational or arbitrary death sentences. But the Ohio Supreme Court's thoughtful review of the penalty phase evidence ensured that the trial court did not arbitrarily accept the jury's recommendation that Petitioner Davis receive the death penalty.

The Court therefore rejects Claim 16.

K. Claim 17

Finally, Petitioner Davis argues that the trial court allowed the prosecution to readmit exhibits used during the guilt phase of his trial during the penalty phase. Davis says this deprived him of his rights under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution. The admission of these exhibits, Davis says, led the jury to consider non-statutory aggravating factors during the penalty phase deliberations.

The Ohio Supreme Court denied this claim without opinion. In reviewing Petitioner Davis's direct appeal, the Cuyahoga County Court of Appeals also rejected this claim. The court based its decision on the Ohio Supreme Court's opinion in *State v. Woodard, 68 Ohio St. 3d 70, 78, 623 N.E.2d 75, 81 (1993).* In that case, the court held that the prosecution could introduce any evidence during the penalty

phase "that is relevant to the aggravating circumstances the offender was found guilty of committing.'" *Id.* (quoting OHIO REV. CODE § 2929.03(D)(1)).

The state courts' rejection of Petitioner Davis's claim in no way reflects an unreasonable application of controlling federal law. As the Court explained in discussing Claim 11, the United States Supreme Court has never construed the Constitution as prohibiting jurors from considering aggravating factors other than those set forth in a state statute. *See Zant, 462 U.S. at 878.* Thus, even assuming the challenged exhibits led the jury to consider nonstatutory aggravating factors, Davis fails to show any constitutional violation.

For this reason, the Court rejects Claim 17.

VIII. Conclusion

The Court has considered each of the arguments Petitioner Davis offers in support of his petition for a writ of habeas corpus. For the reasons set forth above, the Court finds that Davis fails to demonstrate his right to a writ of habeas corpus. Accordingly, the Court denied Davis's petition.

IT IS SO ORDERED.

Date: August 23, 2000

James S. Gwin
United States District Judge

ORDER

The Court has entered its opinion in the above-captioned matter. For the reasons set forth above, the Court finds that Davis fails to demonstrate his right to a writ of habeas corpus. Accordingly, the Court denied Davis's petition [Doc. 26].

This case is hereby terminated pursuant to Fed. R. Civ. P. 58. Further, the Court certifies, pursuant to *28 U.S.C. § 1915*(a)(3), that an appeal from this order could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. *See 28 U.S.C. § 2253*(c); FED. R. APP. 22(b).

IT IS SO ORDERED.

Date: August 23, 2000
James S. Gwin
United States District Judge

APPENDIX D

SUPREME COURT OF OHIO

No. 95-1556

The State of Ohio,
Appellee,

v.

Davis,
Appellant.

Appeal from the Court of Appeals
for Cuyahoga County, No. 64270.

Submitted: March 20, 1996

Decided: July 24, 1996

PRIOR HISTORY

Early in the morning of November 26, 1991, two days before Thanksgiving, Amy Perkins, the wife of a popular Cleveland radio personality, was kidnapped from a downtown Cleveland parking lot. She was found fatally shot through the head, thrown out of her car, naked, unconscious, and left for dead. In connection with this incident, a Cuyahoga County jury convicted appellant, Wiley Davis, of aggravated murder and sentenced him to death.

At approximately 8:15 a.m. that day, Mattie Baker saw Davis pacing back and forth in the parking lot where she parked her car. Because Baker recognized him as an

employee of a restaurant where she often lunched, she would have spoken to Davis, but he disappeared before she exited her car.

Baker went to pay for her parking space, but had to walk back to her car because she forgot the number assigned to her space. While approaching her car, Baker again saw Davis, who was now sitting on the driver's side of a gray Toyota with Texas plates parked in the space next to her car. A white female with a "terrified look" was sitting in the passenger seat. Assuming that the woman was in trouble, Baker tried to summon help, but was unsuccessful. Around 9:00 a.m., Gwendolyn Brice looked out the window of her house and observed a small gray four-door car with Texas plates sitting at a stop sign, with a white female inside making a motion with her hands as if "pushing away" something. Brice then heard a "pop," saw glass shatter on the passenger side, and saw the woman's head drop.

Moments later, Brice's aunt, Marjorie Johnson, arrived at the house and parked behind the gray car. Johnson saw a black male with "a full head of hair" as the driver of the car, and a white female in the passenger seat with her head hanging out the window. When the driver looked at his rear-view mirror and saw Johnson, he "pulled off" at high speed.

The next person to see Davis was Nancy Brown, who was parked in her car while waiting with her son and his friends for the school bus to arrive. As she and the children sat in the car, Brown witnessed a blue or dark gray Toyota moving very slowly across the intersection. The driver, whom Brown described as "a dark male" with a "Jheri curl" was leaning over the passenger seat, trying to close the passenger-side door "as if it was stuck, or jammed."

After the car passed, the children drew Brown's attention to a person lying behind some bushes. Brown immediately went down the street to investigate. She discovered a nude white female, unconscious and "barely living." The woman was trying to speak, "but nothing was coming out." Brown ran to a nearby house to call 911. When she returned, she covered the victim with a borrowed blanket and waited with the victim for the ambulance to arrive. Brown specifically testified that the victim was wearing no jewelry. The victim was taken to a hospital, where she died. David Perkins later identified the victim as his wife, Amy Perkins.

About twenty-five minutes after the shooting, the owner of a nearby deli noticed a gray Toyota with Texas plates parked in his lot. When he later went out to look at the car and saw its broken windshield and blood in the car, he called the police. When the police arrived, they found a Federal brand .32 caliber shell casing five to ten feet from the driver's side of the car. In the car, police found the victim's clothing, a checkbook, some personal items that appeared to have been rifled through, and fresh blood on the floor.

Davis did not report to work on November 26 and did not answer the phone when his boss called his home at 8:45 a.m. Later that morning, however, Davis went to his sister Annette's house, which is located approximately three hundred yards from where the victim's car was discovered. When Davis arrived, his sweatsuit had bloodstains on the right side, which Davis explained by claiming that he accidentally shot someone in an altercation. Davis asked Annette's boyfriend, Alfonso Herring, Jr., to loan him a pair of pants and keep the gun for him. Herring hid the gun in a closet and gave Davis a pair of work pants and a sweatshirt. Davis changed and washed the blood off his sweatsuit, which he left hanging in the bathroom. Davis left his sister's house at 9:40 a.m. with his mother.

Later that afternoon, Cleveland police arrested Davis at his girlfriend's house. When the officers executed a warrant to search the house, they found a right shoe with bloodstains on its right-hand side, above the heel, a box of Federal brand .32 caliber ammunition and loose bullets of the same type, but no gun.

After being warned that the police had asked for Annette's address, Herring took Davis's clothes and the gun from the closet, put them in the trunk of his car, and left. Despite a request from Davis not to turn over the gun and clothes to the police, on November 29, upon the advice of an attorney and his father, Herring turned the items over to police.

A Cleveland police firearms examiner test-fired the gun turned in by Herring and after considerable analysis determined that the casing found in the deli parking lot had been fired from the gun turned over by Herring. Further, the county coroner's office found Group O blood on Davis's right shoe and the right sleeve of his sweatsuit. However, both Davis and Perkins had Group O blood. Yellow stains on the sweatsuit's right shoulder and left leg could not be identified as blood, but a stain on the right leg tested positive for "human protein."

Amy's husband, David, identified the car as Amy's and testified that his wife always wore a custom-made engagement wedding ring and a woman's Rolex watch. He further testified that the jewelry has been missing since Amy's death.

Davis was ultimately charged on four counts. Counts One and Two charged aggravated murder under *R.C. 2903.01(A)* and (B). Each count carried three felony-murder capital specifications--kidnapping, aggravated robbery and rape/attempted rape. Davis was also charged separately with

kidnapping and aggravated robbery. The jury convicted Davis of all counts listed above and all specifications thereto and recommended death sentences on Counts One and Two. The trial court sentenced Davis to death and ordered him held in solitary confinement on the twenty-sixth day of each month until his execution. The court of appeals affirmed the convictions and the sentence except for the solitary confinement provision.

The cause is now before this court upon an appeal as of right.

DISPOSITION

Judgment affirmed in part and reversed in part.

COUNSEL

Stephanie Tubbs Jones, Cuyahoga County Prosecuting Attorney, Frank Gasper and Diane Smilanick, Assistant Prosecuting Attorneys, for appellee. David L. Doughten and John P. Parker, for appellant.

JUDGES

MOYER, C.J., F.E. SWEENEY, PFEIFER AND STRATTON, JJ., CONCUR. DOUGLAS AND RESNICK, JJ., CONCUR IN JUDGMENT ONLY.

OPINION BY: COOK

OPINION

Cook, J. Davis has presented this court with sixteen propositions of law pertaining to both the guilt and sentencing phases of his trial. Pursuant to the mandate of *R.C. 2929.05(A)*, we have considered each of appellant's propositions of law and have reviewed the sentence for appropriateness and proportionality.

We have previously held that *R.C. 2929.05* does not require this court to address and discuss, in opinion form, each and every proposition of law raised in a capital case. See, *e.g., State v. Allen (1995), 73 Ohio St. 3d 626, 628, 653 N.E.2d 675, 680; State v. Poindexter (1988), 36 Ohio St. 3d 1, 3, 520 N.E.2d 568, 570.* Accordingly, we continue to adhere to our view on this issue and address only those issues that warrant discussion. For the following reasons, we affirm the court of appeals' judgment and uphold Davis's death sentence.

I. The Guilt Phase

A. *Venue/Pretrial Publicity*

The critical issue in Davis's first proposition of law is whether the trial court's refusal to change venue violated Davis's fair trial rights. In order to safeguard the fair trial rights of a defendant, a trial court can change venue "when it appears that a fair and impartial trial cannot be held" in that court. Crim.R. 18; *R.C. 2901.12(K).* In *State v. Lundgren (1995), 73 Ohio St. 3d 474, 479, 653 N.E.2d 304, 313,* we reaffirmed our position that "'"[a] change of venue rests

largely in the discretion of the trial court, and *** appellate courts should not disturb the trial court's [venue] ruling *** unless it is clearly shown that the trial court has abused its discretion."'" (Citing *State v. Maurer [1984], 15 Ohio St. 3d 239, 250, 15 Ohio B. Rep. 379, 388-389, 473 N.E.2d 768, 780,* quoting *State v. Fairbanks [1972] 32 Ohio St. 2d 34, 37, 61 Ohio Op. 2d 241, 243, 289 N.E.2d 352, 355.)*

Davis asserts that constant and excessive prejudicial media coverage before and during his trial made it impossible to seat an impartial jury, in spite of the trial court's precautions and efforts during voir dire. The majority of the publicity about this case was disseminated in November and December 1991. The trial did not take place until May 1992. Compare *State v. Landrum (1990), 53 Ohio St. 3d 107, 559 N.E.2d 710* (delay of trial to February from September arraignment found to have helped dissipate any effects from the pretrial publicity). While newspaper articles did reference Perkins's murder following a similar incident in March 1992, two months prior to trial, the articles mentioned the murder only briefly, and with no details.

Pretrial print and electronic media coverage of the crime, while significant, did not act to deprive Davis of a fair trial. In *State v. Bayless (1976), 48 Ohio St. 2d 73, 98, 2 Ohio Op. 3d 249, 262, 357 N.E.2d 1035, 1051,* we concluded that "a careful and searching *voir dire* provides the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality." The transcript of voir dire indicates that publicity in this case, while significant, was not pervasive. Moreover, the trial court took substantial measures to ensure that pretrial publicity did not prejudice Davis's right to a fair trial.

The trial court individually questioned over sixty veniremen and all but a few were queried as to the impact of pretrial publicity. While a sizable majority knew at least

some details of the crime, ten knew nothing about the crime at all, and another eight had only vague, sketchy knowledge. The trial court readily excused those in the venire who had formed fixed opinions or were otherwise unsuitable. As such, the trial jury was not tainted by excessive exposure to pretrial publicity. In support of this conclusion, the record shows that the defense made only four challenges for cause and waived half of its peremptory challenges. Cf. *Murphy v. Florida (1976), 421 U.S. 794, 803, 95 S. Ct. 2031, 2037, 44 L. Ed. 2d 589, 596;* and *State v. Thompson (1987), 33 Ohio St. 3d 1, 5, 514 N.E.2d 407, 413.*

Davis also maintains that there was "continuous" media coverage during voir dire. However, the record does not show the content or amount of such coverage at that time. Moreover, the court instructed all veniremen at the outset not to read, watch, or listen to any media accounts of the trial until being dismissed from the case, and there is no evidence that anyone disobeyed this warning.

In light of the foregoing, we conclude that the media coverage surrounding this case was not so pervasive and sensational as to preclude a fair trial in Cuyahoga County.

In addition to the general publicity issue, Davis also asserts that publication by the media of his criminal record, along with information "highly probative of his guilt," was enough to create a presumption of prejudice. However, this claim ignores the mandate of *Murphy v. Florida*, which held that pretrial publicity about a defendant's criminal record does not create an automatic presumption of prejudice. *Murphy, 421 U.S. at 798, 95 S. Ct. at 2035, 44 L. Ed. 2d at 593-594.*

Davis's first proposition of law is overruled.

B. *Pretrial Lineups*

Davis's second proposition of law similarly lacks merit. He proposes that we rule that the trial court erred in failing to suppress the identification testimony of three witnesses at trial because the witnesses' identifications resulted from unduly suggestive lineups and were not otherwise reliable.

Mattie Baker, Nancy Brown, and Diane Tomc, who saw Davis in downtown Cleveland on November 26, around 7:45 in the vicinity of the parking lot where the abduction occurred, all identified Davis in lineups as the man they saw on November 26, 1991.

When a witness has been confronted with a suspect before trial, due process requires a court to suppress an identification of the suspect if the confrontation was unnecessarily suggestive of the suspect's guilt and the identification was unreliable under all the circumstances. *State v. Waddy (1992), 63 Ohio St. 3d 424, 438, 588 N.E.2d 819, 830-831*, citing *Manson v. Brathwaite (1977), 432 U.S. 98, 116, 97 S. Ct. 2243, 2254, 53 L. Ed. 2d 140, 155*, and *Neil v. Biggers (1972), 409 U.S. 188, 196-198, 93 S. Ct. 375, 381-382, 34 L. Ed. 2d 401, 410-411*. However, no due process violation will be found where an identification does not stem from an impermissibly suggestive confrontation, but is instead the result of observations at the time of the crime. *Coleman v. Alabama (1970), 399 U.S. 1, 5-6, 90 S. Ct. 1999, 2001, 26 L. Ed. 2d 387, 394*.

The day after the murder occurred, Baker and Brown picked Davis out of a lineup and identified him as the man they saw with Amy Perkins. A week later, Tomc also picked Davis out of a lineup as the man she saw near the crime scene shortly before the kidnapping. Davis claims these lineups were unnecessarily suggestive, because the other participants looked so unlike him that he stood out.

On both November 27 and December 3, Davis was lined up with five other black males. All, including Davis, had facial hair; however, the complexions of the men varied and none had a bushy, curly hairstyle like Davis's.

A defendant in a lineup need not be surrounded by people nearly identical in appearance. *New York v. Chipp (1990), 75 N.Y.2d 327, 336, 553 N.Y.S.2d 72, 77, 552 N.E.2d 608, 613.* "Even *** significant dissimilarities of appearance or dress" will not necessarily deny due process. 1 LaFave & Israel, Criminal Procedure (1984) 587, Section 7.4.

Davis also argues that he was the only one in either lineup with jail slippers on his feet and no street clothes under his jail uniform. However, this did not affect the integrity of the lineups. Baker, Tomc, and Detective Leo Allen of the Cleveland Police Department testified that the participants' street clothes were not visible under the jail uniforms. Their footwear may have been visible, but the witnesses were told to look at faces only. Baker thought all the participants "had on basically the same slippers," and Tomc could not recall whether they had any footwear on.

Even if we were to accept Davis's contention that the lineups were unnecessarily suggestive, the identifications were nonetheless reliable under the totality of the circumstances. In order to determine the reliability of the identification, we must consider (1) the witness's opportunity to view the defendant at the time of the incident, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description, (4) the witness's certainty when identifying the suspect at the time of the confrontation, and (5) the length of time elapsed between the crime and the identification. *Waddy, 69 Ohio St. 3d at 439, 588 N.E.2d at 831*, citing *Neil, 409 U.S. at 199-200, 93 S. Ct. at 382, 34 L. Ed. 2d at 411.*

Baker knew Davis, having seen him more than twenty times before. While she testified at trial that she saw Davis on television before the lineup, at the voir dire of identification witnesses she did not so testify, and Davis did not renew his motion to suppress in light of Baker's trial testimony. See *State v. Campbell (1994), 69 Ohio St. 3d 38, 45, 630 N.E.2d 339, 348.* Davis also argues that Detective Allen tainted Baker's identification by asking her "to identify Wiley Davis in a lineup." However, Baker testified that she did not recall Allen's exact words, and even if Allen did use Wiley Davis's name, Baker recognized Davis only because of his employment at the restaurant she frequented and did not know him by name. Even assuming Allen used Davis's name, that would not affect the reliability of Baker's identification.

Brown's identification is also reliable. She had a good opportunity to see the driver as the car rolled past her, close at hand and "slow enough for me to get a good look *** ." Her attention was undivided, and her identification was positive. While Davis claims Brown's identification was tainted by news coverage, Brown testified that she did not see any photos of Davis in the news media before the lineup.

Of the three identifications, Tomc's is the most problematic, however, her testimony at trial merely placed Davis near, but not at, the parking lot about half an hour before Baker placed him in the car with the victim. Independent of Tomc's testimony, the state produced overwhelming proof that Davis was Perkins's killer. Accordingly, even assuming error in the trial court's admission of Tomc's identification testimony, we would be unable to conclude that such error compels a reversal of Davis's conviction. *State v. Williams (1983), 6 Ohio St. 3d 281, 290, 6 Ohio B. Rep. 345, 353, 452 N.E.2d 1323, 1333,* citing *Harrington v. California (1969), 395 U.S. 250, 254, 89 S. Ct. 1726, 1728-1729, 23 L. Ed. 2d 284, 287-288.*

Davis's second proposition of law is overruled.

C. *Attempted Rape*

We find merit in Davis's third proposition of law, in which he contends that the state failed to prove him guilty of the attempted rape specifications.

Attempted rape requires that the actor (1) intend to compel submission to sexual conduct by force or threat, and (2) commit some act that "convincingly demonstrates'" such intent. See *State v. Heinish (1990), 50 Ohio St. 3d 231, 238-239, 553 N.E.2d 1026, 1035*, quoting *State v. Woods (1976), 48 Ohio St. 2d 127, 132, 2 Ohio Op. 3d 289, 292, 357 N.E.2d 1059, 1063*.

The only evidence supporting the attempted rape specifications is Gwendolyn Brice's testimony that just before Davis shot Perkins, Brice saw Perkins trying to push Davis away, acting as if "she [Perkins] didn't want to do something," the fact that Perkins was nude when Davis dumped her from the car, and the forensic evidence showing that there were possible finger marks on Perkins's left thigh.

While removing the victim's clothing can amount to a "substantial step" toward the commission of rape, *State v. Powell (1990), 49 Ohio St. 3d 255, 261, 552 N.E.2d 191, 198*, a defendant cannot be convicted of attempted rape *solely* on evidence that he removed the victim's clothing. There must be evidence indicating purpose to commit rape instead of some other sex offense, such as gross sexual imposition, *R.C. 2907.05*, which requires only sexual *contact*. See *Heinish, 50 Ohio St. 3d at 238-239, 553 N.E.2d at 1035*. In *Heinish*, this court found that a victim's partial nudity combined with saliva on the crotch of her blue jeans was insufficient to show intent to rape. Justice Wright, writing for a majority of the *Heinish* court, commented that while "one

may be tempted to speculate and indeed strongly suspect that crimes other than murder were committed * * *, we would be remiss in performing our duties of review if we let the attempted rape conviction stand." *Id. at 239, 553 N.E.2d at 1035.*

Brice's testimony that Perkins seemed to be trying to push Davis away from her shortly before the shooting occurred is not strongly corroborative of Davis's intent to accomplish sexual conduct. Further, there was no testimony that imprints suggestive of finger marks left on Perkins's thigh were indicative of an attempt to compel sexual conduct as opposed to sexual contact. Contrast *State v. Scudder (1994), 71 Ohio St. 3d 263, 643 N.E.2d 524* (where, along with other evidence indicative of the defendant's intent to commit rape, the court found that bloody hand marks on the victim's thighs were in such a pattern so as to indicate that the killer had tried to force the victim's legs apart).

Based on the evidence presented, we find there was insufficient evidence to prove beyond a reasonable doubt that Davis attempted to rape Perkins. Accordingly, we must reverse the attempted rape specifications.

Despite our reversal of Davis's attempted rape specifications, we are not required to vacate his death sentence. We must independently reweigh the remaining aggravating circumstances against the mitigating factors. See *Clemons v. Mississippi (1990), 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725.* Accordingly, we sustain Davis's third proposition of law, reverse the court of appeals with respect to the attempted rape specifications, and exclude those specifications from our independent review of aggravating circumstances and mitigating factors.

D. *Aggravated Robbery*

Davis claims in his fourth proposition that there was insufficient evidence of aggravated robbery to support a conviction. *R.C. 2911.01(A)(2)* states, "No person, in attempting or committing a theft offense, *** shall *** inflict or attempt to inflict serious physical harm on another." Davis argues that the prosecution failed to prove a "theft offense" under *R.C. 2913.02*. This claim lacks merit.

Amy Perkins's husband, David, testified that Amy "habitually" wore "a combination engagement and wedding ring" consisting of twelve small diamonds and a two-carat marquise, "and she also habitually wore a Rolex watch *** ." David specifically said Amy "wore the items every day." Thus, even though David could not testify from personal knowledge that Amy wore the items on the day she was murdered, a jury could reasonably infer that she did.

Nancy Brown, who saw Amy immediately after she was pushed out of the car, specifically testified that Amy had "no jewelry, no clothing, nothing on." David Perkins testified that the watch and ring were "missing" and he never saw them again. Amy's belongings which were found in the Toyota "appeared to have been rifled through." The majority of the evidence supporting Davis's conviction of a theft offense is circumstantial; however, circumstantial evidence inherently possesses the same value as direct evidence. *State v. Jenks (1991), 61 Ohio St. 3d 259, 574 N.E.2d 492*, paragraph one of the syllabus. Such evidence, when coupled with the circumstances of the kidnapping and murder, is sufficient for a rational jury to find beyond a reasonable doubt that a theft offense took place. See *State v. Allen (1995), 73 Ohio St. 3d 626, 632, 653 N.E.2d 675, 683.*

Davis's fourth proposition of law is overruled.

II. Penalty Phase

A. *Jury Instructions*

In his eleventh proposition of law, Davis argues that the trial court improperly gave the jury an "acquittal first" instruction during the penalty phase of the trial. In support of this proposition, Davis cites *State v. Thomas (1988), 40 Ohio St. 3d 213, 533 N.E.2d 286,* wherein this court outlined the progression that a jury must follow when the trial court charges it on the indicted offense as well as a lesser included offense or offenses:

"A jury must unanimously agree that the defendant is guilty of a particular criminal offense before returning a verdict of guilty on that offense. If a jury is unable to agree unanimously that the defendant is guilty of a particular offense, it may proceed to consider a lesser included offense upon which evidence has been presented. The jury is not required to determine unanimously that the defendant is not guilty of the crime charged before it may consider a lesser included offense." *Id.* at paragraph three of the syllabus.

Thomas dealt with jury instructions regarding a guilt determination and therefore is not directly applicable to the death penalty versus life imprisonment recommendation that a jury is required to make in the penalty phase of a capital case. Nevertheless, Davis's argument that a "proper [jury] instruction would have informed the jury that had the state failed to prove the principal charge or had the jury been unable to agree on whether the state had failed to prove the elements of the greater offense[,] it could have considered the lesser charge" raises an issue identical to that which formed the basis of our recent decision to overturn a death sentence in *State v. Brooks (1996), 75 Ohio St. 3d 148, 661 N.E.2d 1030.* Because the pertinent jury instructions given in this

case are distinguishable from those given in *Brooks*, however, this case warrants dissimilar disposition.

In *Brooks*, the trial court charged the jury that "'you are now required to determine *unanimously* that the death penalty *is inappropriate before* you can consider a life sentence.'" (Emphasis added.) *Id. at 159, 661 N.E.2d at 1040.* As a result of this instruction, the jury was required to issue a death sentence recommendation unless each juror was convinced that the death penalty was inappropriate. *Id. at 160, 661 N.E.2d at 1041.* The *Brooks* court found error in the trial court's instruction because it was in direct conflict with *R.C. 2929.03(D)(2).*

The *Brooks* court concluded that the erroneous jury instruction was prejudicial to the defendant because it gave jurors the impression that a single juror could not prevent a death penalty recommendation on his or her conviction that the aggravating circumstances in a case do not outweigh the mitigating factors.

Davis cites the following portion of the trial court's jury instructions in support of his argument:

"On the other hand, if after considering all of the relevant evidence raised at trial, the testimony, other evidence, the unsworn statement of Wiley Davis, Jr. and the arguments of counsel, you find that the state of Ohio failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant, Wiley Davis, Jr., was found guilty of committing, outweigh the mitigating factors, then you will return your verdict reflecting your decision; that is, you must find that the State has failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant was found guilty of committing outweigh the mitigating factors.

"In this event you will then proceed to determine which of the two possible life imprisonment sentences to recommend to the Court."

However, Davis has omitted the first portion of the trial court's charge, which states:

"*If all twelve members of the jury* find by proof beyond a reasonable doubt that the aggravating circumstances which Wiley Davis, Jr. was found guilty of committing outweigh the mitigating factors, if any, then you must return such finding for the Court." (Emphasis added.)

When read as a whole, the trial court's instruction effectively informed the jury that a death penalty recommendation could be returned only after a unanimous vote that the aggravating circumstances that Davis was found guilty of committing outweigh the mitigating factor presented in the case beyond a reasonable doubt. Moreover, unlike the instructions given in *Brooks*, the jury was not instructed that it was required to *unanimously* determine that the death penalty was inappropriate before it could consider the life sentence alternatives. Nevertheless, it cannot be disputed that the jury instruction given in this case lacks the clarity of the model instruction contemplated in *Brooks*, which urges trial courts to underscore a solitary juror's ability to prevent a death penalty recommendation.

In the instant case, in addition to giving the contested charge, the trial court read the verdict forms to the jury and thereafter charged it that all twelve jurors were required to be in agreement before returning any of the verdicts. The court also instructed the jury as follows:

"Now, your initial conduct upon entering the jury room, again, is a matter of importance. You should consult with each other; consider each other's views, and deliberate with

an objective of reaching an agreement, if you can do so, without doing violence to your individual conscience and good judgment.

"You should do so only after a discussion and a consideration of the case with your fellow jurors.

"Remember, each of you is equal in the jury room, and you shouldn't hesitate to change your opinion if convinced by your fellow jurors that you are wrong.

"However, do not surrender any honest conviction in order to be congenial, or to reach a verdict solely of the belief of the other jurors." Upon review of all of the instructions given in this case, it is clear that the jury was adequately informed that unanimity was required to return a death penalty recommendation. Each juror was made aware that he or she could prevent a death penalty recommendation by finding that the aggravating circumstances in the case do not outweigh the mitigating factors—an essential fact which sets this case apart from *Brooks*.

Because Davis has failed to demonstrate that his right to a fair trial was prejudiced as a result of the contested jury instruction, we overrule his eleventh proposition of law.

In his fifth proposition of law, Davis contends that, in order to convict on the *R.C.2929.04(A)(7)* specifications, the jury had to find *unanimously* either that Davis was the principal offender or that he killed with prior calculation and design. Davis claims error because the jury was not so instructed; however, Davis did not request any such instruction at trial. Under the plain error rule, Davis can prevail only by showing that "but for the [alleged] error, the outcome of the trial clearly would have been otherwise." *State v. Long (1979), 53 Ohio St. 2d 91, 7 Ohio Op. 3d 178, 372 N.E.2d 804*, paragraph two of the syllabus.

We find that the alleged error here was not outcome-determinative. The jury convicted Davis of aggravated murder on Count One of the indictment. To do so, the jury had to unanimously find prior calculation and design. Further, because there was no evidence produced at trial that a second actor participated in committing the aggravated murder, the jury's unanimous verdict necessarily includes a finding that Davis was the principal offender. See *State v. Woodard (1993), 68 Ohio St. 3d 70, 74-75, 623 N.E.2d 75, 78-79.*

Count Two of the indictment charged Davis with killing Perkins in the course of committing, attempting, or fleeing the commission or attempted commission of "Kidnapping *and/or* Aggravated Robbery *and/or* Rape." (Emphasis added.) Davis contends that the jury had to unanimously determine which felony had been committed, and should have been so instructed.

Again, Davis did not request such an instruction, waiving this issue absent plain error. We find that the alleged error was not outcome-determinative. Although Count Two was worded disjunctively, both it and Count One carried a separate felony-murder specification for each of the felonies alleged. The jury convicted Davis of each specification individually. The jury also separately convicted Davis of kidnapping (Count Three) and aggravated robbery (Count Four). Because the jury made a separate, unanimous finding of guilt as to each of the predicate felonies, there is no plain error.

Davis's fifth proposition of law is overruled.

B. *Prosecutorial Misconduct*

In his seventh proposition of law, Davis maintains that three comments in the prosecutor's penalty-phase closing

argument were improper. He argues that the prosecutor's reference to the defendant's unsworn statement, an appeal to the jury's sense of outrage, and an argument on nonstatutory aggravating circumstances were all improper. However, the only comment to which Davis objected at trial was the prosecutor's reference that Amy Perkins "died a horrible death," was dumped onto the street "like garbage *** with no clothes on, for anybody to take a look at her," and had a large head wound that steamed in the cold air.

While we find that most of the disputed statement was fair comment on the evidence and within the bounds of the prosecutor's wide latitude in closing argument, the reference to the steaming head wound is arguably improper because it tended to focus attention on the grotesque aspects of the crime. Cf. *Thompson, 33 Ohio St. 3d at 14-15, 514 N.E.2d at 420; State v. Keenan (1993), 66 Ohio St. 3d 402, 407-408, 613 N.E.2d 203, 208.* However, the prosecutor's improper comment was isolated and did not deprive the defendant of a fair trial. Therefore, it does not constitute reversible error. See *Smith v. Phillips (1982), 455 U.S. 209, 220, 102 S. Ct. 940, 947, 71 L. Ed. 2d 78, 88, fn. 10.*

Because Davis failed to object at trial to the following comments, he waived any error unless he can demonstrate plain error. However, we need not invoke a plain error analysis, as neither of the complained of prosecutorial comments constituted misconduct.

Davis first complains of the prosecutor's comment that Davis's unsworn statement "was not subject to cross-examination." Davis claims that such a comment is forbidden by *State v. DePew (1988), 38 Ohio St. 3d 275, 528 N.E.2d 542,* paragraph two of the syllabus.

DePew holds that "the prosecutor may comment that the defendant's statement has not been made under oath * * *, but such comment must be limited to reminding the jury that the defendant's statement was not made under oath, in contrast to the testimony of all other witnesses." *Id. DePew* limits only prosecutorial comment on the lack of an oath. In contrast, prosecutorial comment on the lack of cross-examination is consistent with *DePew*. See *State v. Murphy (1992), 65 Ohio St. 3d 554, 579, 605 N.E.2d 884, 904.*

Davis additionally bases an allegation of misconduct on the prosecutor's comment that "the Judge is going to instruct you that you must consider the nature of the offense, the history, character, and background of the offender." Davis claims that the prosecutor could not discuss these issues, since the defense did not raise them in mitigation. *DePew, supra.*

However, under *R.C. 2929.04(B)* the jury must consider the nature and circumstances of the offense and the offender's history, character, and background, whether the defense raises these issues or not. Therefore, it is proper for a prosecutor to discuss them. *State v. Gumm (1995), 73 Ohio St. 3d 413, 416-423, 653 N.E.2d 253, 259-264.* As such, we find that the prosecutor here did not try to mislead the jury into considering and weighing these factors as aggravating circumstances, see *id. at 422, 653 N.E.2d at 263-264,* and overrule Davis's seventh proposition of law.

C. *Merger*

In his fifteenth proposition of law, Davis contends that the trial court erred by failing to merge the two aggravated murder counts before submitting the question of penalty to the jury. However, pursuant to *State v. Poindexter (1988), 36 Ohio St. 3d 1, 5, 520 N.E.2d 568, 572,* this is not required.

We conclude that the trial judge should have merged the two counts before finally sentencing Davis. See *State v. Huertas (1990), 51 Ohio St. 3d 22, 28, 553 N.E.2d 1058, 1066.* Accordingly, we merge the two convictions so that a single death sentence remains. *State v. Hawkins (1993), 66 Ohio St. 3d 339, 346, 612 N.E.2d 1227, 1232.*

Because the error in sentencing was merely procedural and did not involve any substantial right, it constitutes harmless error. *State v. Brown (1988), 38 Ohio St. 3d 305, 317-318, 528 N.E.2d 523, 538-539.* Accordingly, we merge Davis's aggravated murder convictions and overrule Davis's fifteenth proposition of law in all other respects.

III. Sentencing Opinion

In his fourteenth proposition, Davis contends that the trial court's sentencing analysis was flawed. However, errors in the sentencing opinion can be corrected by this court's independent reweighing of aggravation and mitigation. See., *e.g., State v. Fox (1994), 69 Ohio St. 3d 183, 191-192, 631 N.E.2d 124, 131.*

Davis argues that the opinion was factually inaccurate. The opinion states, "Once [Davis] had isolated his innocent victim, he moved with practiced precision." It continues with the statement that Davis "made Amy Perkins beg and plead for her life." While these statements are not supported by the record, this court's independent review can correct that problem by not relying on them. *Allen, 73 Ohio St. 3d at 643, 653 N.E.2d at 690.*

Further, while we find that the opinion conveys a tone of moral outrage, the opinion's substance does not support Davis's inference that the trial court considered and weighed the nature and circumstances as a nonstatutory aggravating circumstance. Therefore, this proposition is overruled.

IV. Ineffective Assistance of Counsel

Davis claims in his thirteenth proposition that his trial counsel was ineffective because counsel failed to preserve the claims presented in his fifth, sixth, seventh, ninth, eleventh, and twelfth propositions.

We find that Davis's counsel did not perform deficiently. The disputed propositions either did not constitute error or were harmless. Further, given the strong evidence of guilt and the inconsequential mitigation, we find that these alleged errors are not prejudicial under *Strickland v. Washington (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674,* because they do not undermine any confidence in the reliability of the result. There can be no claim "that the decision reached would reasonably likely have been different absent the [alleged] errors." *Id. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699; State v. Bradley (1989), 42 Ohio St. 3d 136, 143, 538 N.E.2d 373, 380.*

Davis's thirteenth proposition is overruled.

V. Independent Sentence Assessment

A. *Aggravating Circumstances v. Mitigating Factor*

Having found that the evidence shows beyond a reasonable doubt that Davis committed the murder while committing or attempting to commit aggravated robbery and kidnapping, we now turn to our independent assessment of whether the aggravating circumstances Davis was found guilty of committing outweigh the mitigating factor adduced by Davis. We determine that the aggravating circumstances outweigh the mitigating factor presented beyond a reasonable doubt.

The defense essentially proffered no mitigating factors at all, except brief pleas for mercy by Davis, his wife, his sister, and his employer. Davis's entire unsworn statement was: "I am a little nervous right now, but I respect you all and you all's decision, and I just beg you all, spare my life.

"I understand what the Perkins family is going through, but my family is going through it too. That's all I got to say."

Davis's counsel expressly disclaimed reliance on the specific mitigating factors in *R.C. 2929.04(B)(1)* through (6) and relied solely on *R.C. 2929.04(B)(7)*—"Any other factors that are relevant to *** whether the offender should be sentenced to death." In very brief closing argument, counsel asked for mercy, emphasized the jury's "tremendous" responsibility, and asserted that "there must be something there worth saving" because Davis's employer had testified for him in both phases of trial, whereas "most employers would distance themselves *** from someone charged with a crime." The defense was unable to produce anything more, despite an extensive investigation that included a thorough search for mitigating factors.

While pleas for mercy made by Davis's wife, sister, and employer deserve some consideration, see *State v. Webb (1994), 70 Ohio St. 3d 325, 342-343, 638 N.E.2d 1023, 1038,* the mercy pleas practically stand alone as mitigating evidence. There is little or no mitigation in the nature and circumstances of the offense. Further, the defense presented no evidence of Davis's history, his character, or background.

Davis was convicted of two valid death specifications: kidnapping and aggravated robbery. Because these outweigh the mitigating factor beyond a reasonable doubt, we find that the death sentence is appropriate.

B. *Proportionality*

We also conclude that the penalty imposed is proportionate when compared with similar capital cases. This court has upheld death sentences in two cases involving kidnapping and aggravated robbery See *State v. Roe (1989), 41 Ohio St. 3d 18, 28-29, 535 N.E.2d 1351, 1363,* and *State v. Cook (1992), 65 Ohio St. 3d 516, 530-531, 605 N.E.2d 70, 85.* Moreover, the court has often upheld death sentences where only one of these aggravating circumstances existed. See, e.g., *State v. Morales (1987), 32 Ohio St. 3d 252, 513 N.E.2d 267,* and *State v. D'Ambrosio (1995), 73 Ohio St. 3d 141, 652 N.E.2d 710* (kidnapping); *State v. Clark (1988), 38 Ohio St. 3d 252, 527 N.E.2d 844, State v. Carter (1995), 72 Ohio St. 3d 545, 651 N.E.2d 965, State v. Allen, supra* (aggravated robbery). Thus, the sentence is proportionate to those imposed in similar cases.

VI. Conclusion

We reverse the judgment of the court of appeals with respect to Davis's conviction of the attempted rape specifications and the merger of Davis's aggravated murder convictions and affirm its judgment and the sentence imposed in all other respects.

Judgment affirmed in part and reversed in part.

MOYER, C.J., F.E. SWEENEY, PFEIFER AND STRATTON, JJ., CONCUR.

DOUGLAS AND RESNICK, JJ., CONCUR IN JUDGMENT ONLY.

APPENDIX

Proposition of Law No. 1: "The trial court must grant a change of venue where the extensive pretrial publicity renders it impossible for the defendant to obtain a fair trial."

Proposition of Law No. 2: "A conviction which arises from an unduly suggestive lineup must be overturned as such a conviction is violative of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution."

Proposition of Law No. 3: "A criminal conviction for attempted rape may not be sustained where the evidence supporting the charge does not constitute proof beyond a reasonable doubt."

Proposition of Law No. 4: "In order to sustain a conviction of aggravated robbery and a corresponding capital specification, the jury must find beyond a reasonable doubt as to each and every element of *R.C. § 2911.01* and *R.C. § 2929.04(A)(7).*"

Proposition of Law No. 5: "Failure to find an essential element of a capital specification results in the invalidation of that specification."

Proposition of Law No. 6: "The injection of irrelevant trial phase evidence into the penalty phase deliberation violates the integrity of the verdict."

Proposition of Law No. 7: "During the closing argument of the penalty phase, the prosecutor may not improperly comment on the defendant's unsworn statement, appeal to the jury's sense of outrage, or argue non-statutory aggravating factors."

Proposition of Law No. 8: "The trial court and the prosecutor may not instruct the jury that their decision in the penalty phase is a recommendation. This instruction is a violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 10 and 16 of the Ohio Constitution."

Proposition of Law No. 9: "Where the trial court improperly instructs the jury that the specifications of the indictment are in fact the aggravating circumstances, the resultant sentence of death is improper because the constitutionally required narrowing has been violated."

Proposition of Law No. 10: "When requested, the trial court must provide the jury with an instruction regarding residual doubt during the penalty phase of a capital trial."

Proposition of Law No. 11: "The trial court may not provide the jury with an 'acquittal first' instruction during the penalty phase of a capital trial."

Proposition of Law No. 12: "The trial court must provide accurate penalty phase instructions. Where inaccurate instructions misguide the jury as to their duties under the law, the resultant sentence is unreliable and violative of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 10 and 16 of the Ohio Constitution."

Proposition of Law No. 13: "Where trial counsel fails to object to erroneous jury instructions and improper comments

of the prosecutor, the defendant is denied effective assistance of counsel where there is a reasonable probability that the death sentence would not have been recommended had the objections been proffered."

Proposition of Law No. 14: "A death sentence may not be sustained where the mitigating factors presented at trial outweigh the statutory aggravating factors present in the case."

Proposition of Law No. 15: "The trial court may not sentence a defendant to death two times for a single homicide. This double sentence violates *R.C. § 2941.25(A)* and the Double Jeopardy Clause contained in Section 10, Article I of the Ohio Constitution and the Fifth Amendment to the United States Constitution."

Proposition of Law No. 16: "Imposition of the death sentence violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I, of the Ohio Constitution.

"A. The death penalty authorized by the Ohio Revised Code deprives capitally-charged defendants of their lives without due process of law, denies equal protection and imposes cruel and unusual punishment in violation of the Ohio and United States Constitutions.

"B. *R.C. § 2929.022*, § 2929.03, and § 2929.04 violate the accused's rights to effective assistance of counsel and to a trial before an impartial jury, as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Sections 9, 10, and 16, Article [I] of the Ohio Constitution.

"C. *R.C. § 2929.03*, § 2929.04 and § 2929.022 violate the Eighth and Fourteenth Amendments to the United States

Constitution and Sections 9 and 16, Article I of the Ohio Constitution by failing to provide adequate guidelines for deliberation, leaving the jury without proper guidelines in balancing the aggravating circumstances and mitigating factors.

"D. *R.C. § 2929.022*, § 2929.03 and § 2929.04 and Crim. R. 11(C)(3) place an unconstitutional burden on the accused's right to a jury trial under the Sixth, and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution and his rights to be free from compulsory self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution.

"E. *R.C. § 2929.03* fails to provide a meaningful basis for distinguishing between life and death sentences, as it does not explicitly require the jury, when it recommends life imprisonment, to specify the mitigating factors found, or to identify its reasons for such sentence. This denies the accused his rights under *R.C. § 2929.03(A)*, the Ohio Constitution and the Federal Constitution.

"F. *R.C. § 2929.021*, § 2929.03 and § 2929.05 fail to assure adequate appellate analysis of arbitrariness, excessiveness and disproportionality of death sentences and the Ohio Supreme Court fails to engage in a level of analysis that ensures against arbitrary death sentencing.

"G. The appellate review provision of *R.C. § 2929.05* fails to specifically require inquiry and findings regarding arbitrariness, passion or prejudice, and thus is constitutionally inadequate under the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16 [of Article I] of the Ohio Constitution.

"H. The Ohio death penalty statute impermissibly mandates imposition of the death penalty and precludes a mercy option in the absence of mitigating evidence or when aggravating circumstances outweigh mitigating factors. The statute also fails to require a determination that death is the appropriate punishment.

"I. *R.C. § 2929.03*, § 2929.04 and § 2929.05 violate the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Ohio Constitution by failing to require the jury to decide the appropriateness of the death penalty.

"J. The Ohio death penalty scheme permits imposition of the death penalty on a less than adequate showing of culpability by failing to require a conscious desire to kill, premeditation, or deliberation as the culpable mental state.

"K. The Ohio 'beyond a reasonable doubt' standard of proof fails to meet the requirement for higher reliability for the guilt determination phase of a capital case.

"L. The aggravating circumstance the accused is charged with committing, *R.C. § 2929.04(A)(7)*, is constitutionally invalid when used to aggravate *R.C. § 2903.01(B)*, aggravated murder.

"M. *R.C. § 2929.03*, § 2929.04 and § 2929.05 violate the Eighth and Fourteenth Amendments to the United States Constitution and Article [I], Sections 9 and 16 of the Ohio Constitution by failing to properly allocate the burden of proof during [the] mitigation phase of trial."

APPENDIX E

THE STATE OF OHIO, ss: DONALD C. NUGENT, J.

COUNTY OF CUYAHOGA,

IN THE COURT OF COMMON PLEAS
(CRIMINAL BRANCH)

THE STATE OF OHIO,

PLAINTIFF, CASE NO. 1:99 CV 1649

v.

WILEY DAVIS, JR.,

DEFENDANT.

PARTIAL TRANSCRIPT OF TRIAL PROCEEDINGS

Pages 1881-1889 and 1890-1895

[1881] Now, the State of Ohio has the burden of proving by proof beyond a reasonable doubt that the aggravating circumstances which the defendant, Wiley Davis, Jr., was found guilty of committing are sufficient to outweigh the factor or factors, if any, in mitigation of the imposition of the sentence of death.

Again, what is reasonable doubt? As you know the Legislature of the State of Ohio has defined reasonable doubt as follows:

[1882] "Reasonable doubt is present when after you have carefully considered and compared all the evidence you cannot say you are firmly convinced of the truth of the charge.

"Reasonable doubt is a doubt based on reason and common sense.

"Reasonable doubt is not mere possible doubt because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt.

"Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs."

Now, what are the aggravating circumstances? Now, in this particular case the aggravating circumstances are precisely set forth in Specifications One, Two, and Three of your guilty verdict forms as to Count One and Count Two of the indictment, and I have read them to you, and I have [1883] enumerated them again here in the instructions.

You can just refer to what I previously have read to you. It is unnecessary for me to read them again.

Now, the defendant shall be given great latitude in the presentation of evidence of any factor or factors in mitigation of the imposition of the sentence of death.

The defendant shall have the burden of going forward with the evidence of any factor or factors in mitigation of the imposition of the sentence of death.

Your determination as to the existence of any one or more factors in the mitigation of the imposition of the sentence of death must be predicated upon the evidence

presented in this case, both at trial, and during this sentencing proceeding. You may not speculate or conjecture about issues where there is no evidence.

[1884] Notwithstanding the requirement that the defendant shall have the burden of going forward with the evidence of any factor in mitigation of the imposition of the sentence of death the prosecution shall have the burden of proving by proof beyond a reasonable doubt that the aggravating circumstances that the defendant was found guilty of committing are sufficient to outweigh the factor or factors in mitigation of the imposition of the sentence of death.

Now, the existence of any mitigating factor or factors does not preclude the imposition of a sentence of death upon Wiley Davis, Jr. has been found guilty of committing.

Now, mitigating factors are factors that, while they do not justify or excuse the crime, nevertheless [1885] in fairness and mercy, may be considered by you as extenuating or reducing the degree of the defendant's blame or punishment.

These mitigating factors include but are not limited to the nature and circumstances of the offense or offenses, the history, character, and background of the offender, that are in the evidence, and any mitigating factor or factors that you may find from the evidence presented during trial and during this sentencing hearing.

Now, during this sentencing hearing the defense presented testimony that you are to decide whether it is a relevant factor of mitigation to the issue of whether Wiley Davis, Jr. should be sentenced to death.

Now, you will be called upon to decide the factual questions as to whether or not the defendant in the first place produced any evidence as to any of the mitigating factors; that is, has the defendant met the [1886] burden of going forward with any evidence of any factor or factors in mitigation of the imposition of the sentence of death?

If you find there is no evidence of any mitigating factor or factors you will still be required to determine whether the aggravating circumstances outweigh the non-existent mitigating factor or factors beyond a reasonable doubt.

Now, to outweigh means to weigh more than, to be more important than. The existence of a mitigating factor or factors does not preclude or prevent the death sentence if the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

It is the quality of the evidence [1887] that must be given primary consideration by you. the quality of the evidence may or may not be the same with the quantity of the evidence; that is, the number of witnesses or exhibits presented.

It is not only the quantity of the aggravating circumstances versus the quantity of the mitigating factors which is to be the basis of your decision. It is the quality—let me read that again.

It is not only the quantity of the aggravating circumstances versus the quantity of the mitigating factors which is to be the basis of your decision. It is the quality or importance of the mitigating factors and the aggravating circumstances which must be considered.

Now, the procedure which you must follow in arriving at your verdict in the sentencing phase of the trial is set forth in Revised Code Section 2929.03 of the Revised Code of the State of Ohio.

A summary digest of that Section [1888] provides that you, the trial jury, must consider all of the relevant evidence raised at trial, the testimony, other evidence, the unsworn statement of the defendant, Wiley Davis, Jr., and the arguments of counsel, and you must determine whether the aggravating circumstances which the defendant, Wiley Davis, Jr., was found guilty of committing, are sufficient to outweigh any mitigating factor or factors you find that are present in this case.

If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances which Wiley Davis, Jr. was found guilty of committing outweigh the mitigating factors, if any, then you must return such finding to the Court.

I instruct you as a matter of law that if you make such finding then you have no choice and must recommend to the Court that the sentence of death be imposed upon the defendant, Wiley Davis, Jr.

[1889] On the other hand, if after considering all of the relevant evidence raised at trial, the testimony, other evidence, the unsworn statement of Wiley Davis, Jr. and the arguments of counsel, you find that the State of Ohio failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant, Wiley Davis, Jr., was found guilty of committing, outweigh the mitigating factors, then you will return your verdict reflecting your decision; that is, you must find that the State has failed to prove

beyond a reasonable doubt that the aggravating circumstances which the defendant was found guilty of committing outweigh the mitigating factors.

In this event you will then proceed to determine which of the two possible life imprisonment sentences to recommend to the Court.

* * *

[1890]
THE COURT: Ladies and gentlemen, there will be four verdict [1891] forms that are submitted to you at this time, and I think they are self-explanatory.

I am not going to be exhaustive like I was before, but in Count One there is a verdict that says:

"We the Jury in this case, being duly impaneled and sworn, do find that the State of Ohio has proved beyond a reasonable doubt that the Aggravating Circumstances which [1892] the defendant, Wiley Davis, Jr. was found guilty of committing outweigh the mitigating factors in this case.

"We, the Jury, recommend that the sentence of death be imposed upon the defendant, Wiley Davis, Jr.," and there are twelve signature bars, where you would sign that, if that was your verdict.

The second verdict as to Count One says:

"We, the Jury in this case, being duly impaneled and sworn, do find that the Aggravating Circumstances which the defendant, Wiley Davis, Jr., was found guilty of committing are not sufficient to outweigh the Mitigating Factors present in this case beyond a reasonable doubt," and "We, the Jury, recommend that the defendant, Wiley Davis,

Jr. be sentenced to life imprisonment with parole eligibility after serving—and then down here there is an asterisk that says, "Insert in ink either twenty (20) or thirty (30) full years of imprisonment," and, again, twelve signature bars.

Count Number Two, same thing, on each of the two verdict forms, and, again, I think that that would be self-explanatory when you look at that.

Now, as you know, since this is a criminal case the law requires that in order for you to reach a decision all twelve of you must be in agreement.

Now, you notice that during the whole trial I have used the word "recommend" and I want to make sure that you understand that you are not to construe [1893] that word as to diminish your responsibility in this matter.

It is an awesome task and the fact that the word "recommend" is used should not be considered by you to lessen your responsibility.

Now, you must not be influenced by any consideration of prejudice in your determination of the evidence in this case.

It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply these instructions of the Court to your finding, and then render your decision accordingly.

In fulfilling your duty your efforts must be to arrive at a just and fair verdict. Consider all of the evidence and make your finding with intelligence and impartiality, and without bias and prejudice, so that both the State of Ohio and the defendant will believe that their case was fairly and impartially tried.

[1894] Again, if during the course of trial the Court said or did anything that you would consider an indication of my view on this case you are instructed to totally disregard it.

Now, your initial conduct upon entering the jury room, again, is a matter of importance. You should consult with each other; consider each other's views, and deliberate with an objective of reaching an agreement, if you can do so, without doing violence to your individual conscience and good judgment.

You should do so only after a discussion and a consideration of the case with your fellow jurors.

Remember, each of you is equal in the jury room, and you shouldn't hesitate to change your opinion if convinced by your fellow jurors that you are wrong.

However, do not surrender any honest conviction in order to be congenial, or to reach a verdict [1895] solely because of the belief of the other jurors.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JEROME HENDERSON,

No. C-1-94-106

Petitioner,

v. ORDER

TERRY COLLINS, WARDEN,

Defendant.

This matter is before the Court on Petitioner's Memorandum of Law Re: Applicability of *Davis v. Mitchell*; Results of DNA Testing (doc. 167), Respondent's memorandum of Law Regarding the Result6s of the DNA Testing and the Applicability of *Davis v. Mitchell* (doc. 172) and upon communication from the Sixth Circuit that it will not proceed on Petitioner's appeal of this Court's denial of Petitioner's Motion for Relief from Judgment Pursuant to Fed.R.Civ.P. 60(b) unless this Court issues a certificate of appealibility.

On February 14, 1994, Petitioner filed a Petition for Writ of Habeas Corpus challenging the constitutionality of the death sentence imposed upon him for the murder and attempted rape of Mary Acoff (doc.1). On August 4, 1999, this Court granted Petitioner's Petition for Writ of Habeas Corpus (hereinafter, "Petitioner's Writ") based on the Court's finding that the "Allen Charge" given to the jury during their sentencing deliberations was improper, but denying the writ

in regard to Petitioner's claims of ineffective assistance of counsel (doc. 99)[1] On August 8, 2001, the Sixth Circuit affirmed this Court's reasoning in regard to the ineffective assistance of counsel but reversing this Court's grant of Petitioner's writ in regard to the Allen Charge given to the jury (doc. 113).

On May 7, 2002, Petitioner filed with this Court a Motion for Relief from Judgment regarding this Court's determination of the issue of ineffective assistance of counsel (doc 118). On May 22, 2003, Respondent filed a Memorandum in Opposition to Petitioner's Motion for Relief from Judgment (doc. 123). The Court held a hearing in this matter on September 4, 2002. At that hearing, the Parties came to a joint agreement to conduct DNA testing of the materials found at the crime scene. On October 30, 2002, this Court denied Petitioner's Motion for Relief from Judgment (doc. 143).

On February 4, 2003, the Sixth Circuit issued an Order in *Davis v. Mitchell*, 318 F.3d 682 which this Court determined may require further judicial review of this case. Therefore, the Court, in an Order dated February 28, 2003, ordered the Parties to brief the Court concerning the possible applicability of *Davis v. Mitchell* and advising the Court in regard to the report furnished by Forensic Science Associates reporting the results of the DNA testing evidence found at the crime scene (doc. 164). Petitioner filed his Memorandum of Law on April 29, 2003 (doc. 167) and Respondent filed its Memorandum of Law on May 29, 2003 (doc. 172).

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[1] *See Henderson v. Collins*, 101 F. Supp.2d 866 (S.D. Ohio 1999) for the Court's detailed analysis of the constitutionality of the Allen Charge.

DNA TESTING RESULTS

Petitioner argues in his Memorandum of Law that the Court should grant his writ because the DNA testing established that Petitioner was not the source of the semen found in the victim's vagina and that no evidence, direct or circumstantial, remains which could support the conviction for attempted rape (doc. 164). For the reasons that follow, the Court disagrees with Petitioner and will deny his writ pursuant to the results of the DNA testing.

The standard cited by Petitioner in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) sets a high bar for granting of federal habeas relief. According to the Supreme Court, federal habeas relief cannot be granted for Petitioner's claim unless "it is found that upon the record evidence adduced at trial, no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324-6.

The Court agrees with Respondent that the new DNA evidence in Henderson's case does not satisfy this high standard. The lack of Henderson's semen in the victim's body may have *allowed* a juror to find a reasonable doubt as to whether Henderson attempted to rape the victim, but the Court finds that its absence would not keep rational jurors from finding him guilty of attempted rape. The Court agrees with the government's position that the numerous non-fatal wounds on the victims body as well as the fact that she was found nude with her legs spread apart and the fact that nothing of value was taken from her apartment could have allowed a reasonable juror to find Petitioner had entered the victim's apartment in an attempt to rape her.

There were facts similar to this case in the Supreme court case, *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489 (1997) in which the Court, applying the similar standard of review for evaluating claims of miscarriage of

justice, reversed a grant of writ of habeas corpus. The Supreme Court held that a capital petitioner challenging his death sentence must show by clear and convincing evidence that no reasonable juror would have found him eligible for the death penalty in light of the new evidence. *Calderon*, 523 U.S. at 559-60, 118 S. Ct. at 1502. *citing Sawyer v. Whitley*, 505 U.S. 333, 339, 112 S. Ct. at 2519 (1992). The Court in *Calderon* indicated that even if the semen deposited in the body of a raped woman had not been matched with that of the petitioner, the injuries to the victims body, the body's position and condition sufficiently indicated rape to deny the petitioner's claim that he was innocent of the act which merited him the death penalty. *Id.* 523 U.S. at 560, 118 S. Ct. at 1503.

Given such precedent, the Court cannot grant Petitioner a writ of habeas corpus pursuant to the results of the DNA evidence. However, the Sixth Circuit has not had the opportunity to review this case in light of the new evidence, and the Court finds Petitioner has articulated a substantial showing of the denial of a constitutional right in the determination of his guilt or innocence of attempted rape, the aggravating factor which made Petitioner eligible for the death penalty. Because of this, and because of the gravity of sentence imposed on Petitioner, the Court will grant a certificate of appealibility to allow the Sixth Circuit to review Petitioner's claims in regard to the significance of the DNA evidence.

APPLICABILITY OF *DAVIS v. MITCHELL*

On May 7, 2002, Petitioner filed a Motion for Relief from Judgment (doc. 118). In an Order dated October 30, 2002, the Court refused to reconsider Petitioner's argument that he received ineffective assistance of counsel based on his counsel's failure to raise an objection to the trial court judge's so-called "acquittal first" instruction. The Court

reasoned that Petitioner's ineffective assistance of appellate counsel claim as it related to Petitioner's appellate counsel's failure to raise an objection to the acquittal first instruction had previously been reviewed by the Court and rejected by the Court. The Court further reasoned that the Sixth Circuit reviewed the Court's decision and determined that the Court's analysis concerning these issues was correct. *Henderson v. Collins*, 262 F.3d 615, 623 (6th Cir. 2001).

Shortly after the Court denied Petitioner's Motion for Relief from Judgment, the Sixth Circuit issued a decision in a *Davis v. Mitchell*, 318 F.3d 682 (February 2003). This Court finds that this decision cast substantial doubt on its decision concerning Petitioner's objection to the acquittal first instruction and the Sixth Circuit's decision vacating the writ granted to Petitioner based on an improper Allen Charge.[2]

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[2] Petitioner raised objections to two separate and distinct instructions given to the jury. Petitioner's original motion for writ objected to the instruction given to the jury to continue in its deliberation after it announced its deadlock (the Allen Charge). This Court reasoned that when the jury reported it was deadlocked, it essentially informed the trial judge that it could not come to a unanimous decision that the death penalty was appropriate. According to this Court, the Allen Charge impermissibly impressed upon the jury that, before it could consider the life sentence options, it must unanimously reject the death sentence.

Although in a different form and given to the jury before commencing their deliberations, the objected to acquittal first instructions left the jury with essentially the same idea that it had to unanimously reject the death sentence before considering life sentence options. Thus the Court finds it appropriate to apply the same reasoning when determining the constitutionality of these instructions.

In its *Henderson* decision denying Petitioner a writ, the Sixth Circuit cited acquittal first jury instructions reviewed in *State v. Davis*, 76 Ohio St.3d 107, 666 N.E.2d 1099 (1996) and found the *Henderson* instructions indistinguishable. *Henderson v. Collins*, 632 F.3d 615, 621-22 (6th Cir. 2001). thus, because the *State v. Davis* instructions were acceptable, so were those instructions given in the *Henderson* trial. However, recently in *Davis v. Mitchell*, 318 F.3d 682, the Sixth Circuit reviewed jury instructions that are indistinguishable from the instructions at issue in *State v. Davis*, 76 Ohio St.3d 107, 666 N.E.2d 1099 and the case at hand. The Sixth Circuit opined that "[i]nstructions that leave a jury with the impression that juror unanimity was required to mitigate the punishment from death to life imprisonment clearly violate the Eighth Amendment." *Davis v. Mitchell*, 318 F.2d at 685. The Sixth Circuit concluded that, because the jury instructions given in *State v. Davis* and *Davis v. Mitchell* did just that, those instructions violated the Eighth Amendment. *Id.* at 689-90.

This Court notes that the dissent in *Davis v. Mitchell* observed the instructions given in that case were identical to those given in *Henderson* and determined by the majority to be permissible. 318 F.2d at 692. This Court firmly believes then, that the decision made by the Sixth Circuit in *Henderson* has been called into grave doubt. The Court agrees with Respondent that the *Davis v. Mitchell* decision may well create confusion and lead to conflicting decisions in district courts. However, those possible conflicts cannot prevent this Court from examining Henderson's case in light of *Davis v. Mitchell*. In fact, because Petitioner faces the ultimate and irreversible punishment imposed by the state, it is imperative that the Court proceed with caution and allow for further review and clarification from the Sixth Circuit. This Court will not take part in the grave miscarriage of justice that may result from its previous denial of Petitioner's Motion for Reconsideration.

Therefore, the Court hereby VACATES its denial of Petitioner's Motion for Reconsideration (doc. 143) and CONDITIONALLY GRANTS a writ of habeas corpus in regard to jury instructions issued during the sentencing phase of Petitioner's trial and, STAYS execution of Petitioner's sentence to death. Further, the Court having denied Petitioner's writ in regard to the new DNA evidence, CERTIFIES pursuant to 28 U.S.C. § 2253 that Petitioner has made a substantial showing of the denial of a constitutional right in regard to the evidence concerning Petitioner's guilt or innocence of attempted rape, the aggravating factor which made Petitioner eligible for the death penalty.

SO ORDERED.

Date: 7/9/03

S. Arthur Spiegel
United States
Senior District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:01CV601

MICHAEL TAYLOR,
Petitioner,

v.

BETTY MITCHELL, WARDEN,
Respondent.

Decided and Opinion Filed: March 3, 2003

James G. Carr, United States District Judge.

COUNSEL

For Michael Taylor, Petitioner: Jennifer P. Hite, Pamela J. Prude-Smithers, Office of the Public Defender, Columbus, OH. For Margaret Bagley, Respondent: Carol A. Ellensohn, Heather L. Gosselin, Office of the Attorney General, Columbus, OH. For Margaret Bagley, Respondent: Michael L. Collyer, Office of the Attorney General, Cleveland, OH.

OPINION BY: James G. Carr

OPINION

ORDER

This is a capital habeas corpus case arising from the petitioner's conviction of one count of aggravated murder with specifications. The petitioner has exhausted his state court remedies.

For the reasons that follow, I find that all but one of the petitioner's contentions is without merit. With regard to his contention that the evidence was insufficient to enable a rational trier of fact to find him guilty beyond a reasonable doubt of aggravated murder, I, however, agree. The petition for a writ of habeas corpus shall, accordingly, be granted.

Introduction

A. Factual Background

The following summary of the evidence from the petitioner's trial is taken from the opinion of the Ohio Supreme Court affirming the petitioner's conviction on direct appeal. *State v. Taylor, 78 Ohio St.3d 15, 15-17, 1997 Ohio 243, 676 N.E.2d 82 (1997).*

On November 24, 1992, defendant-appellant, Michael N. Taylor, shot and killed Marion "Donny" Alexander in a bar. Despite appellant's self-defense claims, the jury found prior calculation and design, convicted appellant of aggravated murder, and recommended the death penalty.

Between 10:00 and 11:00 p.m. on November 24, 1992, appellant, his girlfriend, Sandra Paul, and David Roseborough arrived at the Club Seville, a bar in Garfield Heights, Ohio. Shortly thereafter, Marion "Donny" Alexander came in. Alexander, a regular in the bar, greeted Darlene Youngblood and Debra Lymore, who both worked at the bar, as well as Denise Shephard, another regular. They all sat around the main bar, but Alexander later took a seat alone at the nearby piano bar. Alexander did not talk with Paul, whom he had formerly dated, nor to appellant, whom he had previously met.

According to Shephard, Alexander acted quietly, and did not complain to or argue with appellant that night. However, appellant, Paul, and Roseborough described Alexander as loud and boisterous. Appellant and Paul claimed Alexander stared at them when they were dancing that night soon after they arrived at the club. According to Roseborough, Alexander flashed a large roll of bills and said, "If a nig *** ain't getting it like this, he ain't supposed to be in here." Paul recalled Alexander saying, "Any nig *** [who] did not have any money, wasn't shit." Appellant believed Alexander was trying to humiliate him.

Later, some twenty to thirty minutes after appellant, Paul, and Roseborough had arrived, Paul went to the jukebox to play music. Alexander asked her to play a song for him. Appellant, still seated at the main bar, objected to Alexander's request. Youngblood testified that appellant told Alexander, "Put your own goddamn dollar in the box. My woman is not playing you no music." Roseborough recalled appellant said, "Man, I give her the money so she could play the music that we want to hear. *** If you want to hear some music, put your money in there like I did ***."

According to Youngblood, Alexander replied, "It ain't no problem. I have got a dollar here. *** I just asked her to play ***." According to Lymore, Alexander replied, "What's the problem? I have been knowing her. I talk to her when you are not around." Appellant again told Alexander, "Put your own goddamn dollar in there." Alexander and appellant glared at each other for a "couple of seconds," but did not approach each other. Then Paul walked back to where appellant was sitting.

According to appellant's friends, Alexander told appellant after the jukebox incident that "this is his bar, and he does what *** he wants to do, [and] says what *** he wants," and if appellant had "a problem with anything, I'm saying you can see me today, tomorrow." Alexander also allegedly cursed appellant as a "punk, hip mother fucker." It was asserted by the defense that when Paul was leaving the bar, Alexander said, "Bitch, *** [I told] you not to bring this mother fucker up here to my bar."

When Paul got back to her seat, appellant told her, "Get your goddamn coat. We're getting out of here." Paul asked, "Can I drink my drink first *** [and] hear my music." Appellant told her he did not "have time for this 'Kid's shit,' Let's go." Paul put her coat on and left the bar. Roseborough and appellant started to follow her, but Roseborough changed direction and walked over behind Alexander to the jukebox. Appellant stopped a little past Alexander. Roseborough said to appellant, "Look out," and Alexander stood up and raised his hands. Alexander told appellant, "Don't start no shit and it won't be no shit."

Appellant replied, "What did you say, mother fucker," pulled out a semiautomatic 9 mm pistol, and shot Alexander several times. After being shot three times, Alexander fell face down and tried to crawl away. Then appellant walked closer to Alexander and fired three or four more shots into

his back. He left the scene in a taxi, calling out, "Self-defense." Later he surrendered voluntarily to the Garfield Heights Police.

B. Procedural Background

The single Count in the indictment charged aggravated murder, defined as a purposeful killing with prior calculation and design. The Count contained three death specifications: 1) the offender had a firearm on or about his person or under his control while committing the offense charged; 2) the offender was convicted on April 8, 1974, of the purposeful killing or purposeful attempt to kill another; and, 3) the offender had previously been convicted of or pleaded guilty to an aggravated felony, to wit, murder.

Trial lasted from April 20 through April 26, 1993. On April 27, 1993, the jury returned a verdict of guilty as to the sole count and also found that the three specifications under Count One had been proven beyond a reasonable doubt.

At the mitigation hearing the petitioner presented evidence that he suffers from paranoid personality disorder. The petitioner also presented evidence from his minister, family members and a co-worker. Petitioner made an unsworn statement explaining his involvement in the crime. On April 29, 1993, the jury returned with a recommendation that petitioner be sentenced to death. The court followed the jury's recommendation, making an independent finding that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. Petitioner was sentenced to death on May 28, 1993.

The court of appeals affirmed the decision of the trial court. The Ohio Supreme Court affirmed the conviction and sentence. *State v. Taylor, 78 Ohio St.3d 15, 1997 Ohio 243, 676 N.E.2d 82 (1997).* The United States Supreme Court

denied the petitioner's petition for a writ of certiorari. *Taylor v. Ohio, 522 U.S. 851, 139 L. Ed. 2d 90, 118 S. Ct. 143 (1997).*

On September 23, 1996, the petitioner filed a post-conviction relief petition in the trial court. That court found that many of petitioner's claims had been raised on direct appeal and that petitioner had received a fair trial and was properly convicted. The trial court dismissed the petitioner's post-conviction petition on February 2, 1998.

Petitioner appealed the denial of his post-conviction petition to the court of appeals, which affirmed the trial court's decision on November 19, 1999. On March 15, 2000, the Ohio Supreme Court declined to accept petitioner's appeal for review on the basis that the petitioner had presented no substantial constitutional question.

On January 19, 2001, the petitioner filed a second post-conviction relief petition. Finding that petitioner was not unavoidably delayed from discovering the facts asserted in the petition, the trial court dismissed the petition on August 24, 2001.

Petitioner appealed the denial of his second post-conviction petition. The court of appeals affirmed the trial court's decision on May 30, 2002. On October 2, 2002, the Ohio Supreme Court declined to accept petitioner's appeal for review on the basis that it did not involve any substantial constitutional question.

The petitioner's habeas corpus petition asserts nine claim for relief, which will be discussed in the order in which they appear in the petition.

1. Ineffective Assistance of Counsel

a. Failure to Procure a Ballistics Expert

The petitioner first claims that counsel were ineffective for failing to obtain a ballistics expert during the guilt phase of trial. A ballistics expert, petitioner claims, would have been able to corroborate petitioner's self-defense testimony during trial by demonstrating that the wounds petitioner inflicted on Alexander were consistent with petitioner's account of the murder.

This claim is procedurally defaulted. Petitioner first raised this issue as his eighth claim in the amended successor post-conviction petition. Because this issue involves evidence dehors or outside the record, it should have been raised in the first post-conviction relief petition. *State v. Perry, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967).* Petitioner's attempt to raise this issue in his amended successor post-conviction petition was denied on the procedural ground that he could not meet any of the requirements enabling him to comply with Ohio's second or successive post-conviction petition statute, *O.R.C. § 2953.23.* Thus, that court did not address the merits of this claim.

Petitioner alleges he may overcome the procedural default hurdle by asserting that it would be a miscarriage of justice to invoke a procedural bar. Specifically, petitioner alleges he is actually innocent and that this fact should permit an adjudication on the merits of this claim.

In *Schlup v. Delo, 513 U.S. 298, 314-15, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995),* the United States Supreme Court determined that the petitioner in that case should have been afforded review of the merits of his claims after evidence suggested that he had been the victim of mistaken identity in the murder of a prison inmate. The Court discussed the

standard to be applied when a habeas petitioner asserts actual innocence. The Schlup Court held that, where a petitioner seeks to use claims of actual innocence as a gateway to assert he was wrongly convicted of a crime, rather than objecting to the death sentence, the petitioner must demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id. at 327* (quoting *Murray v. Carrier, 477 U.S. 478, 496, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986)).* To constitute the necessary "probability," the petitioner must show "that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.*

In Schlup the Court described the specific analysis a district court must employ when faced with a petitioner's allegation of actual innocence:

It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.

Id. at 329.

During his post-conviction proceedings, petitioner obtained the services of Wayne Hill, a forensic consultant specializing in shooting reconstruction, to buttress his self-defense claim. The petitioner asserts that Hill's affidavit, Doc. 78, at p. 274, supplies the "new" evidence that the Schlup Court requires to assert an actual innocence claim. Far from demonstrating that no juror, acting reasonably, would have convicted petitioner in light of this affidavit, the

Hill affidavit merely undercuts the state's theory of how the murder occurred. More importantly, as is described below, defense counsel elicited many of the findings to which Hill avers during cross-examination of the coroner. Thus, the evidence is not particularly "new" to petitioner's case. Because the Hill affidavit fails to meet the actual innocence standard articulated in *Schlup*, petitioner cannot use it to overcome the procedural bar to this claim.

This claim is without merit in any event. Petitioner asserts that counsel were ineffective for failing to request and secure a ballistic expert during trial. To prevail on a claim of ineffective assistance of counsel, petitioner must show both that his counsel's performance "fell below an objective standard of reasonableness" and that he was prejudiced as a result. *Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)*. Counsel are presumed to have been competent, and the petitioner has the burden of overcoming this presumption. *United States v. Cronic, 466 U.S. 648, 658, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984)*; *United States v. Fortson, 194 F.3d 730, 736 (6th Cir. 1999)*. In applying Strickland, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *466 U.S. at 689*.

During defense counsel's cross-examination of the coroner, Robert Challener, counsel evoked much of the information that petitioner now asserts would have aided him. For example, petitioner alleged during trial that after firing his weapon, Alexander dove around a pillar, leading petitioner to cease firing as he no longer perceived himself in imminent danger. Tr. 765. In his affidavit, Hill supports this theory, noting that one of the wounds, wound 7, is consistent with a circumstance in which the victim is leaping or diving. Doc. 78, at 279. Defense counsel elicited this testimony during cross-examination of the coroner:

Counsel: You testified that your examination leads you to believe that the nature of that wound would be consistent with a situation where the deceased would be lying on the floor, if someone had fired at him; is that correct?

Coroner: That's correct.

Counsel: Would it also be consistent with a situation where the deceased might be diving over a table, [if] someone were firing at him?

Coroner: He could be diving over a table, but the barrel of the gun still has to be in back so [that] the trajectory of the bullet is from back to front and upward, irrespective of how the body is placed, the bullet goes from back to front and upward very sharply.

***

Counsel: So, in other words, what you are saying is that, while you indicated to the prosecutor that this particular wound is consistent with a particular situation, it is also consistent with several other situations, isn't it?

Coroner: An infinite number.

Tr. 429-30.

Moreover, Hill avers that if petitioner had fired at Alexander while he lying prone, as the state suggested during trial, then the bullets from wounds 1 and 2 should have either been embedded in the floor underneath Alexander, or "left a clearly visible gouge/scrape in the floor's surface." Doc. 78, at 279. During closing argument of the guilt phase, defense counsel raised this issue, stating:

While you are deliberating, . . ., ladies and gentlemen, note very carefully that almost all the wounds involved here

are what are referred to as through and through wounds. That meant that the bullet, the pellet went all the way through the body of the victim, all right, and if the defendant was standing over the victim and fired into him, I would ask you this: Where are those pellets, okay?

Now, you know, it is incumbent upon the State of Ohio to either produce those pellets, or to explain satisfactorily to you as to why they have not been produced, and I asked the question of the first officer on the scene, "What did you do?"

"Well, we brought in this half-million candle power light, and we flashed it all over the floor looking for evidence."

"You didn't find a single hole in the floor; and didn't find a single pellet on the floor," and the Coroner's testimony clearly indicates there should have been any number of those pellets on the floor, directly under the place where the [victim] was shot, and, yet, the State of Ohio fails to produce a satisfactory explanation as to why they weren't there.

Tr. 833-34.

These excerpts from the record show that counsel raised the core issues delineated in the Hill affidavit. Defense counsel is not objectively unreasonable under Strickland for failing to obtain an expert when "trial counsel reasonably chose to rely upon cross-examination of the State's own witnesses to establish [petitioner's] case." *Smith v. Angelone, 111 F.3d 1126, 1131 (4th Cir. 1997).* Additionally, although closing argument is not evidence, defense counsel undermined the state's theory that petitioner shot Alexander after he was lying on the ground by noting that the police investigation of the bar floor should have yielded those bullets. In light of these actions, it was not unreasonable for defense counsel not to request a ballistics expert.

b. Failure to Object to Inclusion of Aggravating Factor in Indictment

Petitioner claims that counsel were ineffective for failing to object to the aggravated felony specification in his indictment. This claim is procedurally defaulted because petitioner did not raise it as a discreet claim to the Ohio Supreme Court. To exhaust a claim, a petitioner must present it "to the state courts under the same theory in which it is later presented in federal court." *Wong v. Money, 142 F.3d 313, 322 (6th Cir. 1998).* As stated above, petitioner cannot use the miscarriage of justice exception to procedural default by asserting his actual innocence.

Even if this claim were properly raised and addressed in state court, it would lack merit. As described below in grounds for relief 2(c) (aggravated felony instruction) and 6(b) (absence during guilt phase deliberation questions), error occurring as a result of the aggravated felony specification in the indictment was harmless.

Because "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies," *Strickland, 466 U.S. at 697*, it is possible to disregard claims based on the fact that they did not prejudice the petitioner. Because this claim was asserted separately in this Opinion and found to be without merit, counsel's failure to object to the aggravated felony specification in the indictment is not prejudicial as it does not undermine the confidence in the outcome of the proceeding.

c. Failure to Raise Petitioner's State of Mind During Guilt Phase

Defense counsel did not introduce the testimony of court-appointed psychologist, Dr. Rita Politzer, until the mitigation

phase of trial. Petitioner contends that introduction of Dr. Politzer's testimony during the guilt phase to demonstrate his state of mind during the commission of the murder would have led to acquittal.

As an initial matter, respondent correctly notes that this claim was not raised in the petition and, instead, was raised for the first time in the traverse. Traverse at 19. Such action is disfavored. While the Sixth Circuit has yet to address the issue of whether a habeas petitioner may raise new claims in the traverse, other courts have determined a traverse is not the proper pleading to raise new issues because it does not adequately notify the state of the claim or permit the state an opportunity to oppose it. *Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994)*; see also *Jack v. Randall, 2000 U.S. Dist. LEXIS 22381, No. C-2-99-947, 2000 WL 1456992*, at * 7 (S.D. Ohio June 20, 2000) (prohibiting habeas petitioner from asserting new claim in traverse to which respondent had no opportunity to respond). Because, in this case, respondent was afforded the opportunity to respond to this claim in the sur-reply, however, it is not inherently prejudicial to respondent for this court to review this claim.

The petitioner raised this claim to the Ohio Court of Appeals and the Ohio Supreme Court on direct appeal. Both courts rejected the claim pursuant to *Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052(1984)*. n1 The Ohio Supreme Court found the claim to be without merit, stating:

Counsel reasonably chose not to offer evidence of appellant's paranoid personality disorder at the guilt phase in view of the doubtful value and admissibility of such evidence at that stage. See *State v. Cooey (1989), 46 Ohio St.3d 20, 26, 544 N.E.2d 895, 906*; *State v. Wilcox (1982), 70 Ohio St.2d 182, 24 O.O.3d 284, 436 N.E.2d 523* (psychiatric testimony unrelated to insanity is inadmissible to show defendant's

incapacity to form intent). Moreover, appellant has not demonstrated that these tactical choices caused him prejudice, i.e., that "were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley, [(1989) 42 Ohio St. 3d 136, 538 N.E.2d 373]* at paragraph three of the syllabus.

Taylor, 78 Ohio St.3d at 31.

> n1 In the traverse, petitioner alleges that, while the Ohio Supreme Court cited to Strickland when analyzing his ineffective assistance of counsel claim, "there is no evidence that the Supreme Court actually applied the Strickland standard when reviewing Petitioner Taylor's ineffective assistance of counsel issue." Traverse at 40. A review of the Ohio Supreme Court's opinion, however, reveals that this argument is without merit. Although the Ohio Supreme Court did not specifically cite to Strickland at each juncture of its analysis, it clearly applied the two-pronged Strickland test in its review of petitioner's ineffective assistance claim.

The opinion of the Court of Appeals, in large part adopted by the Ohio Supreme Court, additionally noted that "except for a narrow exception in cases involving the battered woman syndrome, expert testimony regarding a defendant's state of mind is inadmissible to prove self-defense." *State v. Taylor, Cuyahoga County App. No. 65711, 1995 Ohio App. LEXIS 4998, 1995 WL 663267,* at *18 (Ohio Ct. App. Nov. 9, 1995).

Because counsel likely would not have succeeded if they had attempted to introduce Dr. Politzer's testimony during the guilt phase of trial, the Ohio Supreme Court concluded that petitioner could not establish a Strickland violation. This conclusion was not an unreasonable one.

d. Failure to Request Bifurcation of Capital Specification

During trial, counsel chose against bifurcating the capital specification, instead determining that the jury could hear evidence of this specification. The petitioner now asserts that this choice was tantamount to prejudicial error.

On appeal, the Ohio Supreme Court found no such error, concluding that "counsel . . . reasonably chose against bifurcation on the death-penalty specification." *78 Ohio St.3d at 31*. It reasoned that because petitioner "claimed self-defense and testified, his prior murder conviction would have been admissible as to his credibility regardless of bifurcation." Id.

Petitioner's claim represents the type of hindsight review of counsel's trial strategy that Strickland specifically rejects. The Ohio Supreme Court's decision finding the claim merit less is not an unreasonable application of *Strickland*.

e. Failure to Object to Prosecutorial Misconduct

The petitioner alleges trial counsel's ineffective assistance because of counsel's failure to object to the prosecutorial misconduct petitioner asserts in his third claim. As petitioner noted in the traverse, respondent did not allege that this claim is procedurally defaulted. In the sur-reply, respondent counters that allegations of procedural default are contained in her third claim. Sur-reply at 3. The third claim, alleging prosecutorial misconduct, is distinct from an ineffective assistance of counsel claim for failure to object to it. Thus, respondent has not alleged procedural default for this claim. "Procedural default is normally a defense that the State is obligated to raise and preserve if it is not to lose the right to assert the defense thereafter." *Trest v. Cain, 522 U.S.*

87, 89, 139 L. Ed. 2d 444, 118 S. Ct. 478 (1997) (internal quotation marks and citations omitted). Thus, a habeas court may forego a procedural default analysis and address the merits of a claim when the respondent fails to raise this defense. See, e.g., *Jamison v. Collins, 100 F. Supp.2d 521, 597 (S.D. Ohio 1998)* (addressing merits of claim when respondent failed to raise procedural default defense in return of writ or supplemental return of writ).

The Sixth Circuit has determined that while a habeas court is not required to undertake a sua sponte procedural default analysis. *Elzy v. United States, 205 F.3d 882, 886 (6th Cir. 2000).* In any event, a court may do so because procedural default is not a jurisdictional bar to reviewing a habeas claim.

A review of petitioner's brief to the Ohio Supreme Court reveals that his ineffective assistance of counsel claim did not rest on a theory of ineffective assistance for failure to object to prosecutorial misconduct. This claim is procedurally defaulted.

Petitioner's allegation of ineffective assistance for failure to object to prosecutorial misconduct also must fail on the merits. As analyzed below, petitioner's underlying prosecutorial misconduct claims lack merit. Because "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies," *Strickland, 466 U.S. at 697*, it is possible to disregard claims based on the fact that they did not prejudice the petitioner. Because the petitioner's prosecutorial misconduct claims are without merit, counsel's failure to object to any alleged, but nonexistent, prosecutorial misconduct was not prejudicial.

f. Failure to Object to Jury Instructions

Petitioner claims that trial counsel were ineffective for failing to object to seven jury instructions: 1) the "acquittal first" instruction during the guilt phase; 2) the "acquittal first" instruction during the mitigation phase; 3) the murder is an aggravated felony instruction; 4) the specific intent instruction; 5) the reasonable doubt instruction; 6) referring to an aggravating circumstance as "repeat murder"; and, 7) the voluntary manslaughter instruction.

Respondent alleges that petitioner procedurally defaulted this claim for failing to raise these issues as discreet ineffective assistance of counsel claims to the Ohio Supreme Court. Petitioner counters that, in fact, he did raise these issues in his Ohio Supreme Court brief on direct appeal. Both assertions are correct. Although petitioner, in fact, did raise this claim to the Ohio Supreme Court, that court found the claims barred, with the sole exception of sub-claim five (5), because petitioner failed to raise these issues to the Ohio Court of Appeals. *78 Ohio St.3d at 31.* Thus, the Ohio Supreme Court conducted a plain error review of these claims.

State court review of an otherwise procedurally defaulted claim to determine whether the error, if any, constituted a manifest miscarriage of justice does not revive the defaulted claim for purposes of federal habeas corpus review. *Paprocki v. Foltz, 869 F.2d 281, 285 (6th Cir. 1989)*; see also *Scott v. Mitchell, 209 F.3d 854, 868 (6th Cir. 2000)* ("manifest injustice" review by Ohio Supreme Court of defaulted claim does not constitute waiver of the default). These claims are procedurally defaulted.

Were they not defaulted, they would not be meritorious in any event. Of the seven sub-claims, petitioner raised four (sub-claims (2), (3), (5), and (7)) in claim two as distinct

improper jury instruction claims. Because the discreet jury instruction claims, as discussed below, are without merit, petitioner could not have suffered prejudice from counsel's failure to have objected to them. Accordingly the above sub-claims are without merit.

In sub-claim (1), petitioner alleges that counsel were ineffective for failing to object to the trial court's "acquittal first" instruction during the guilt phase of trial. A review of the trial court's guilt-phase instructions reveals that the trial court adequately instructed the jury regarding their deliberation process:

If all of you are unable to agree on a verdict of either guilty or not guilty of aggravated murder, then you will continue your deliberations to decide whether the State has proved, beyond a reasonable doubt, all the essential elements of the lesser included offense of murder.

Tr. 868. The trial court provided similar instructions in the event that the jury found the defendant not guilty of, or could not agree on, the murder or voluntary manslaughter charges.

This instruction is not an "acquittal first" instruction because, while it charged the jury that it should deliberate on a lesser offense if it found petitioner not guilty of the greater, it also informed the jury that if they were unable to reach an agreement on an offense, the petitioner could not be found guilty of it.

Because the underlying jury instruction was not improper, the petitioner's claim that counsel were ineffective for failing to object to it lacks merit.

In his fourth sub-claim, petitioner asserts that "the trial court diluted its instruction on specific intent by stating that 'Specific intent is no more or less than a particular intent

proscribed by statute.'" Petition at 8. Without further elaboration on how this instruction was prejudicial, petitioner cannot demonstrate why counsel were objectively unreasonable for failing to object to it.

Finally, petitioner contends that counsel were constitutionally ineffective for failing to object when the trial court referred to the aggravating circumstance as "repeat murder." During the mitigation phase deliberations, the trial court charged: "Aggravated murder, in and of itself, is not an aggravating circumstance. The aggravating circumstance is as follows: Specification two: 'Repeat murder.'" Tr. 968.

This claim is procedurally defaulted because counsel failed to object to it during trial. *State v. Williams, 51 Ohio St.2d 112, 364 N.E.2d 1364 (1977).*

Although noting that trial counsel failed to object to this portion of the instructions, the Ohio Supreme Court found no trial court error in so referring to the aggravating circumstance, stating:

The trial court's use of that short, convenient term to refer to the aggravating circumstance was not improper nor did it inject a nonstatutory aggravating circumstance into the trial. The indictment as well as the trial court used the term "repeat murder" to refer to the specification, and appellant did not object. It is not unusual to use the term "repeat murder" in this context.

Taylor, 78 Ohio St.3d at 30 (citations omitted).

The Ohio Supreme Court's reasoning is sound. The trial court used the term "repeat murder" merely to simplify for the jury the aggravating circumstance introduced during trial. The use of this term was not prejudicial to the petitioner.

g. Ineffective Assistance During Mitigation

Petitioner alleges that counsel were ineffective in three principal areas during the mitigation proceedings. First, the petitioner claims that counsel failed to investigate and introduce evidence of petitioner's background during the mitigation phase. Petitioner also alleges counsel's ineffectiveness for failing to obtain the experts necessary to procure and explain petitioner's social history and psychological deficiencies. Finally, petitioner claims that trial counsel did not adequately prepare the witnesses who did testify, choosing them only moments before placing them on the witness stand.

Respondent alleges that these claims are procedurally defaulted. Although petitioner raised these claims as his first, second, and third causes of action in the first post-conviction petition, the court of appeals determined that the trial court had properly dismissed these claims because petitioner failed to attach the necessary documents to obtain an evidentiary hearing. It stated:

When the claim of ineffective assistance of trial counsel is raised in a petition for postconviction relief, the petitioner bears the burden of submitting evidentiary materials which demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness. *State v. Jackson (1980), 64 Ohio St.2d 107, 413 N.E.2d 819*, syllabus. Absent such a showing, no evidentiary hearing is necessary. *State v. Pankey (1981), 68 Ohio St.2d 58, 59, 428 N.E.2d 413.*

In this instance, no evidentiary materials were submitted to demonstrate that errors occurred or that prejudice resulted. The trial court therefore did not err in denying these claims without holding a hearing. These assignments of error are therefore without merit.

State v. Taylor, Cuyahoga County App. No. 75352, slip op., at 5-6, *1999 Ohio App. LEXIS 5455*, at *7 (Ohio Ct. App. Nov. 18, 1999).

Because of petitioner's failure, this claim is procedurally defaulted. See *Lorraine v. Coyle, 291 F.3d 416, 426-27 (6th Cir. 2002)* (holding state rule barring review of post-conviction petitioner's claims where petitioner failed to provide supporting documentation is adequate procedural ground on which to bar federal habeas review).

Petitioner acknowledges the default but alleges that he may overcome the procedural hurdle. First, petitioner contends that the circumstances present here warrant removal of the procedural default bar because this is an "exceptional case."

In *Lee v. Kemna, 534 U.S. 362, 151 L. Ed. 2d 820, 122 S. Ct. 877 (2002)*, the United States Supreme Court held that, "there are . . . exceptional cases in which exorbitant application of a generally sound [state-court] rule renders the state ground inadequate to stop consideration of a federal question." *Id. at 376* (citing *Davis v. Wechsler, 263 U.S. 22, 24, 68 L. Ed. 143, 44 S. Ct. 13, 21 Ohio L. Rep. 322 (1923)).* There, the Court held that the petitioner's violation of a Missouri state rule requiring that continuance motions be written and accompanied by an affidavit would not bar federal habeas review. Noting that the Missouri procedural rule was both not the basis for the trial court denying the petitioner's motion and that the petitioner, in effect, had substantially complied with the rule's purpose, the Court held that petitioner's failure to comply with the letter of the rule would not bar a merit review in federal habeas court. *Id. at 385*. See also *Osborne v. Ohio, 495 U.S. 103, 110, 109 L. Ed. 2d 98, 110 S. Ct. 1691 (1990)* ("Although we do not doubt the general applicability of the Ohio Rule of Criminal

Procedure requiring contemporaneous objection to jury charges, we nevertheless conclude[] that, in this atypical instance, the Rule would serve no perceivable interest.") (internal quotation marks and citations omitted).

This case presents no exceptional circumstances that overcome the procedural bar. Unlike the petitioner in *Kemna*, Taylor did not substantially comply with the Ohio rule requiring supporting documentation to prove his ineffective assistance of counsel claim. More importantly, the Kemna Court noted that, unlike here, the state court did not invoke the state procedural rule in denying petitioner's motion for a continuance. Because a "State remains free to impose proper procedural bars to restrict repeated returns to state court for postconviction proceedings," *Slack v. McDaniel, 529 U.S. 473, 489, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000)*, this argument must fail.

Petitioner next contends he can demonstrate cause and prejudice to excuse the default. He asserts that because the Ohio post-conviction statutes create a due process property interest in his right to counsel during post-conviction proceedings, he has a concomitant right to constitutionally effective assistance of counsel during his collateral attack. While petitioner acknowledges that he has no constitutional right to post-conviction counsel, he asserts that, pursuant to *Evitts v. Lucey, 469 U.S. 387, 401, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985)*, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the *Due Process Clause*." Consequently, petitioner asserts, post-conviction counsel's failure to attach documents in support of his ineffective assistance claims unconstitutionally divested him of this property interest.

The United States Supreme Court disagrees. In *Pennsylvania v. Finley, 481 U.S. 551, 555, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1987)*, the Court held that a post-conviction petitioner has no right to counsel. Noting that the source of the right to post-conviction counsel was created pursuant to Pennsylvania statute, the Court reasoned that it is the source of the right to counsel, combined with the type of proceeding, that implicates a constitutional right to counsel, and, thus, whether there can be a due process violation. Explicitly rejecting the argument the petitioner makes here, the *Finley* Court held *Evitts* inapplicable to state habeas proceedings because "the substantive holding of Evitts—that the State may not cut off a right to appeal because of a lawyer's ineffectiveness—depends on a constitutional right that does not exist in state habeas proceedings." *Id. at 558.* Accordingly petitioner cannot demonstrate cause and prejudice to overcome his procedural default.

Petitioner next alleges that he can show that he is entitled to a merits review of his claims pursuant to the miscarriage of justice exception to the procedural default rule. Specifically, petitioner alleges he is actually innocent of the death penalty and that this fact should permit an adjudication on the merits of his claims. As stated above, in *Schlup v. Delo, 513 U.S. 298, 314-15, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995)*, the United States Supreme Court determined that the petitioner in that case should have been afforded a merit review of his claims after evidence suggested that he had been the victim of mistaken identity in the murder of a prison inmate.

The Schlup Court reaffirmed an earlier finding that, where a petitioner claims he is actually innocent of the death penalty, as opposed to the underlying crime, a more rigorous standard applies: a petitioner "must show by clear and convincing evidence that but for constitutional error, no reasonable juror would have found the petitioner eligible for

the death penalty." *513 U.S. at 323* (citing *Sawyer v. Whitley, 505 U.S. 333, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992)*) (internal quotation marks and further citations omitted).

Petitioner asserts that the evidence he presented during his post-conviction proceedings—that he suffers from post-traumatic stress disorder (hereinafter "PTSD") and organic brain damage presents significant new evidence that meets this standard. While this evidence is noteworthy and might possibly persuade some jurors not to impose a death sentence, it does show clearly and convincingly that no reasonable juror would have found the petitioner eligible for the death penalty. Accordingly petitioner cannot overcome the procedural default of these claims based on assertions of actual innocence.

Finally, petitioner implores the Court to review counsel's overall performance even if it finds these claims procedurally defaulted. Granting this request, and reviewing the petitioner's claims on the merits, despite his default, I find no basis for relief.

i. Failure to Investigate/Introduce Mitigating Evidence

When examining a claim of ineffective assistance for failure to investigate a petitioner's background and introduce mitigating evidence, "it is best to begin with the evidence Petitioner actually presented in mitigation." *Lorraine v. Coyle, 291 F.3d 416, 427 (6th Cir. 2002)*. During the mitigation phase of trial, defense counsel presented one clinical psychologist, four lay witnesses, and petitioner's unsworn statement.

Initially, Dr. Rita J. Politzer, testified that petitioner suffers from paranoid personality disorder. This disorder, Dr. Politzer stated, would cause an individual to be overly

suspicious, perceiving social situations as threatening, contrary to those not suffering from the affliction. Tr. 907-08. She next stated that, although individuals who suffer from paranoid personality disorder tend to become violent, this disorder generally is amenable to treatment. Id. at 908-09. Dr. Politzer stated that petitioner likely would respond well to treatment for his disorder and adjust well to prison life. Id. at 910.

Counsel next called the four lay witnesses: Suette Bell Steiner, who testified about petitioner's excellent work record; Robert L. Doss, petitioner's minister; Constance Turner, the mother of petitioner's child, and Sharon Levett, petitioner's sister, who testified about petitioner's childhood and character. The petitioner then provided the jury with a brief, unsworn statement. The state presented no rebuttal witnesses.

In the past several years, the Sixth Circuit has issued a number of opinions on this issue. In one of the first such cases, *Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995)*, the court found trial counsel were ineffective for failing to investigate and present mitigating evidence of petitioner's brain damage. Counsel in Glenn utterly failed to prepare for the mitigation phase of trial prior to completion of the guilt phase. Once the jury convicted petitioner, counsel prepared a videotape, later ruled inadmissible by the trial court, of petitioner's neighborhood. *Id. at 1207.* Although counsel did present testimony from, among others, a teacher who had known the petitioner during his childhood and a minister who did not know petitioner but who, rather unsuccessfully, argued against the morality of the death penalty, counsel failed to introduce an array of evidence that would have demonstrated the petitioner's mental inabilities, including I.Q. tests that placed him within the mentally defective range. *Id. at 1208.* The court concluded that, "the failure of John Glenn's counsel to draw the jury's attention to the organic brain

problem here, and to the possibility that it helped turn John Glenn into putty in the hands of his admired older brother [who planned the underlying crime], was both objectively unreasonable and prejudicial." *Id. at 1211.*

In the wake of Glenn, the Sixth Circuit held on several other occasions that counsel's failure to investigate and present mitigating evidence warranted granting habeas corpus relief. For example, in *Carter v. Bell, 218 F.3d 581 (6th Cir. 2000)*, the court held that counsel's representation was constitutionally ineffective because of counsel's use of a residual doubt theory during mitigation when counselneither investigated nor presented evidence of the petitioner's extreme poverty-ridden childhood and mental condition despite counsel's awareness of those circumstances.

Finding that counsel cannot rely on the petitioner as the sole source of information when investigating for mitigating evidence, the Sixth Circuit held that "counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to [its] utility." *Id. at 596.* Several other cases have followed this reasoning. See *Coleman v. Mitchell, 268 F.3d 417, 449-53 (6th Cir. 2001)* (finding counsel acted unreasonably for failing to present evidence of petitioner's horrific childhood, which included physical and psychological abuse); *Skaggs v. Parker, 235 F.3d 261, 266-75 (6th Cir. 2000)* (holding counsel ineffective for failing to investigate and present mitigating evidence); *Groseclose v. Bell, 130 F.3d 1161, 1169-71 (6th Cir. 1997)* (finding counsel's failure to develop "any defense theory whatsoever" and failure to present mitigating evidence was constitutionally ineffective); *Austin v. Bell, 126 F.3d 843, 849 (6th Cir. 1997)* (same).

In several more recent decisions, however, the Sixth Circuit seemingly has limited its previous holdings, stating that "the cases where this court has granted the writ for

failure of counsel to investigate potential mitigating evidence have been limited to those situations in which defense counsel have totally failed to conduct [a mitigation] investigation." *Campbell v. Coyle, 260 F.3d 531, 552 (6th Cir. 2001)*. The court distinguished cases in which counsel failed to investigate altogether from those which "do[] not involve a failure to investigate but, rather, petitioner's dissatisfaction with the degree of his attorney's investigation," noting that in the latter, the Strickland presumption of counsel's reasonableness will be hard to overcome. Id. See also *Lorraine v. Coyle, 291 F.3d 416 (6th Cir. 2002)* (reversing district court and holding no ineffective assistance of counsel for failing to present mitigation evidence, particularly in light of habeas counsel's inability to demonstrate prejudice); *Martin v. Mitchell, 280 F.3d 594 (6th Cir. 2002)* (finding counsel not constitutionally ineffective for failing to present mitigating evidence when counsel did present some, albeit non-exhaustive, evidence in mitigation and petitioner failed to demonstrate prejudice); *Williams v. Coyle, 260 F.3d 684 (6th Cir. 2001)* [*40] (same).

The petitioner alleges that, had counsel performed effectively, counsel would have discovered and could have presented the following evidence during trial: 1) petitioner suffers from seizures; 2) petitioner suffers from severe headaches; 3) petitioner served in the United States Army during the Vietnam conflict from 1966-69, experiencing heavy combat and being exposed to Agent Orange; 4) petitioner's son suffers from seizures; 5) petitioner began carrying a firearm and suffering from sleep disorders and nightmares after his service in Vietnam; 6) petitioner was traumatized by his mother's death; 7) petitioner is a loving parent; and 8) petitioner has a defective heart valve. Moreover, petitioner alleges that evidence that he suffers from PTSD and organic brain damage would have convinced the jury to refrain from imposing a death sentence.

While some of the evidence petitioner proffers is potentially significant, counsel's actions in this case were not objectively unreasonable. Rather than demonstrating a complete "abdication of advocacy," *Austin, 126 F.3d at 849*, counsel's actions in this case are akin to those of counsel in Campbell and Martin. Counsel sought and received a psychiatric evaluation of petitioner, presenting the results during mitigation. Moreover, counsel presented evidence of petitioner's work ethic and his character. Thus, it appears, trial counsel's mitigation strategy met *Strickland* standards. Although petitioner, in hindsight, expresses his "dissatisfaction with the degree of his attorneys[']investigation," *Campbell, 260 F.3d at 552*, Strickland discourages such a retrospective review of counsel's behavior. While it may have benefitted petitioner if counsel had presented at least some of the above-listed evidence, the investigation and concomitant mitigation evidence counsel presented during trial were adequate.

Finally, as respondent notes, some of the evidence petitioner now asserts would have aided him in mitigation was not particularly favorable to him. Specifically, introducing petitioner's Vietnam service records may not have benefitted him. While in the service, petitioner was AWOL and threatened an officer, the latter offense leading to his discharge from service "for the good of the service under other than honorable conditions." Affidavit of Dr. Michael Gelbort, Doc. 77, at 57. Counsel are not required to present testimony when it would elicit unfavorable facts during the prosecutor's cross-examination. *Scott v. Mitchell, 209 F.3d 854, 881 (6th Cir. 2000).*

ii. Failure to Procure Mitigation and Mental Health Experts

Petitioner next takes issue with counsel's failure to procure a mitigation specialist and to obtain a psychologist specializing in PTSD. Additionally, petitioner charges that, had counsel conducted an adequate investigation, counsel would have requested a neurologist to examine petitioner for organic brain damage.

Petitioner fails to demonstrate that counsel's actions were objectively unreasonable. This case is factually similar to *Campbell v. Coyle, 260 F.3d 531 (6th Cir. 2001).* In that case, defense counsel presented psychological evidence during the mitigation phase of trial that the petitioner suffered from polysubstance abuse and had an antisocial personality disorder. *Id. at 537-38.* During state post-conviction proceedings, the petitioner in Campbell presented evidence that his client may have suffered from PTSD as a result of being burned in a fire at age five. *Id. at 546.* Campbell's trial counsel did not present any evidence of PTSD to the jury at either phase of trial. Despite hiring a mitigation specialist and clinical psychologist, counsel remained unaware that petitioner might suffer from this condition. Id.

The court distinguished Campbell factually from *Seidel v. Merkle, 146 F.3d 750 (9th Cir. 1998).* In Seidel the Ninth Circuit determined that trial counsel had been constitutionally ineffective for failing to investigate the petitioner's PTSD even though the pre-trial record was replete with references to petitioner's hospitalization in mental institutions and ingestion of psychiatric medication. *Id. at 755.* After an evidentiary hearing revealed that trial counsel failed to conduct "any" investigation into petitioner's mental health, the court found counsel constitutionally ineffective. Id.

While noting that the finding in Seidel of ineffective assistance was sound under the facts of that case, the Sixth Circuit also found that "an ineffective-assistance-of-counsel claim cannot survive so long as the decisions of a defendant's trial counsel were reasonable, even if mistaken." Id. (citing *White v. McAninch, 235 F.3d 988, 995 (6th Cir. 2000)).*

The court then determined that it was not objectively unreasonable for counsel in Campbell to rely on the psychologist they obtained during trial:

Even though Dr. Chiappone as a trained psychologist failed to detect any evidence of PTSD, [petitioner] asks us to declare that his counsel's independent failure to make the same diagnosis is an objectively unreasonable mistake, depriving him of his *Sixth Amendment* right to the effective assistance of counsel. There is no evidence that Dr. Chiappone was incompetent, or that [petitioner's] lawyers had any reason to question Chiappone's professional qualifications.

We conclude, therefore, that it was objectively reasonable for [petitioner's] trial counsel to rely upon Dr. Chiappone's diagnosis and, further, trial counsel's failure to independently diagnose PTSD was not unreasonable.

Id. at 555.

This holding is fatal to petitioner's claim. As with trial counsel in Campbell, petitioner's trial counsel reasonably relied on Dr. Politzer, a forensic psychologist, who diagnosed petitioner with a paranoid personality disorder, rather than PTSD. The sole fact that petitioner served in Vietnam neither imputes awareness that petitioner suffers from PTSD nor required counsel to investigate its possible existence. Counsel cannot be responsible for procuring a second expert

simply because one expert reached a result that petitioner now asserts is inaccurate. See *Beans v. Black, 757 F.2d 933, 936 (8th Cir. 1985)* (counsel's actions not objectively unreasonable for failing to procure second expert on petitioner's competence when first expert found petitioner competent to stand trial).

Similarly, it is unclear why counsel should have known, as petitioner asserts, to request a neurologist to examine him for organic brain damage. Although during the post-conviction proceedings Dr. Gelbort determined that petitioner may suffer from organic brain damage, Gelbort affidavit, Doc. 77, at 60, petitioner cannot demonstrate that counsel's reliance on Dr. Politzer's clinical impressions was objectively unreasonable. Because Dr. Politzer presumably did not find any evidence of organic brain damage, it was reasonable for counsel to end their psychological inquiry with her conclusions. n2

n2 Dr. Politzer's trial testimony is the only record of her psychological evaluation. During her deposition in this habeas proceeding, Dr. Politzer noted that she did not bill the court for preparing a report in this case. Doc. 52, at 18. While Dr. Politzer did not have the case file in her possession during deposition, she informed habeas counsel that, in some instances, she does not prepare a report for trial at counsel's request if the report would not be a favorable one. Id. at 20. She did not specifically recall if that situation existed in this instance. Id.

Petitioner also cannot show ineffectiveness due to counsel's failure to obtain a mitigation specialist. During the trial, counsel moved the court for a mitigation expert. The trial court, providing no explanation, denied the motion as moot. Petition at 10. Petitioner fails to explain what further

action counsel should have taken. Counsel's failure to procure a mitigation specialist was not objectively unreasonable.

iii. Failure to Prepare Mitigation Witnesses

After trial, petitioner obtained the affidavits of ten family members and friends, some of whom testified during the mitigation phase, who averred that they had valuable mitigation information but were never contacted by trial counsel to testify or were not asked questions during trial to elicit this valuable information. Doc. 11, exhibits 4-14.

These affidavits counter what defense counsel stated during their federal habeas depositions, in which counsel stated that they talked with the witnesses who testified prior to trial, practicing questions and possible cross-examination scenarios with them. Doc. 50, at 18. Moreover, one of petitioner's trial counsel indicated that, prior to trial, he spoke with family members, even attending a prayer meeting with the family at one point. Id. at 34.

Counsel's behavior was not objectively unreasonable. As it appears that counsel had, at least, adequate contact with family members prior to and throughout the trial, petitioner does not allege a sustainable claim of ineffective assistance of counsel.

2. Improper Jury Instructions

Petitioner asserts that the trial court charged the jury improperly regarding 1) voluntary manslaughter, 2) flight; 3) aggravating felony specification; 4) life sentence; and 5) reasonable doubt.

An incorrect jury instruction does not warrant federal habeas corpus relief if it was merely undesirable, erroneous

or universally condemned. Instead, the instruction must violate a constitutional right. *Estelle v. McGuire, 502 U.S. 62, 72, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991).* On review, a court must determine whether there is a reasonable likelihood that the jury applied the instruction in a way that prevents consideration of constitutionally relevant evidence. *Boyde v. California, 494 U.S. 370, 380, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990).* The impropriety of the instruction must be considered in the context of the instructions as a whole and of the entire trial record. Id. "Errors in jury instructions do not rise to the level of a constitutional violation unless the habeas petitioner can establish that the 'instruction by itself so infected the entire trial that the resulting conviction violates due process.'" *Buell v. Mitchell, 274 F.3d 337, 365 (6th Cir. 2001).*

a. Voluntary Manslaughter Instruction

The trial court provided the following voluntary manslaughter instruction during trial:

If you are unable to agree on a verdict of either guilty or not guilty of murder, then you will continue your deliberations to decide whether the State has proved, beyond a reasonable doubt, all the essential elements of the lesser included offense of voluntary manslaughter.

Tr. 870. (emphasis supplied).

This instruction incorrectly allocated the burden of proof to the state. In Ohio, a jury may convict a defendant on the offense of manslaughter only if the defendant proves that the homicide occurred while under the influence of sudden passion or in a sudden fit of rage. *O.R.C. § 2903.03.* The trial court also instructed the jury that if the state fails to prove all the elements of aggravated murder or murder, then it must

consider whether to convict the defendant of voluntary manslaughter. Tr. 870. This was a so-called "acquittal-first" instruction.

Petitioner has procedurally defaulted this sub-claim on two grounds. First, petitioner failed to object to this instruction during trial. As a result, the Court of Appeals ruled that this claim was procedurally defaulted. Accordingly that court declined to consider this claim on its merits, except to examine it for a manifest miscarriage of justice. *State v. Taylor, No. 65711, 1995 Ohio App. LEXIS 4998, 1995 WL 663267*, at *9 (Ohio Ct. App. Nov. 9, 1995). The court found that although the trial court provided the jury with an incorrect voluntary manslaughter instruction, there was no plain error because there was overwhelming evidence of murder in petitioner's case. Id. (citing *State v. Cooperrider, 4 Ohio St.3d 226, 4 Ohio B. 580, 448 N.E.2d 452 (1983)*). As stated above, state court review of an otherwise procedurally defaulted claim to determine whether the error, if any, constituted a manifest miscarriage of justice does not revive the defaulted claim for purposes of federal habeas corpus review. *Paprocki v. Foltz, 869 F.2d 281, 285 (6th Cir. 1989)*; see also *Scott v. Mitchell, 209 F.3d 854, 868 (6th Cir. 2000)* ("manifest injustice" review by Ohio Supreme Court of defaulted claim does not constitute waiver of the default).

Moreover, petitioner failed to raise this claim to the Ohio Supreme Court on direct appeal. Consequently he did not properly exhaust his claim. Exhaustion occurs only "when the highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims." *Lott v. Coyle, 261 F.3d 594, 608 (6th Cir. 2001)* (quoting *Manning v. Alexander, 912 F.2d 878, 881 (6th Cir. 1990)*). If no further remedy exists in state court, however, then exhaustion is no longer at issue. Rather,

the petitioner must demonstrate cause and prejudice for failing to present the claim to state court. *Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994).*

Petitioner asserts that ineffective assistance of appellate counsel can serve as cause to excuse procedural default. United States Supreme Court precedent, however, teaches otherwise. That Court recently determined that a petitioner may only use an ineffective assistance of counsel claim to establish cause if that separate ineffective assistance of counsel claim is, in itself, not procedurally defaulted. *Carpenter v. Edwards, 529 U.S. 446, 146 L. Ed. 2d 518, 120 S. Ct. 1587 (2000).* Thus, pursuant to *Carpenter,* a habeas petitioner must demonstrate either that the distinct ineffective assistance of counsel claim is not procedurally defaulted, or cause and prejudice to excuse the default for that claim. As discussed with regard to claim four, petitioner's ineffective assistance of appellate counsel claim is procedurally defaulted and petitioner cannot show adequate cause and prejudice to excuse the default. Accordingly petitioner may not use ineffective assistance of appellate counsel to excuse his failure to raise this claim to the Ohio Supreme Court.

Even if the claim could be considered on the merits, it would not be well-taken. With regard to the first aspect of this claim, the improper shifting of the burden of proof, the prosecution, as the court of appeals concluded, presented the jury with overwhelming evidence of murder. Petitioner was carrying a weapon when he entered the bar and positioned his companion behind the victim before he confronted him. Thereafter, he shot the victim twice and continued to shoot even after the victim had fallen. The trial court's incorrect burden shifting instruction did not deny petitioner due process. n3

n3 This conclusion does not alter the conclusion, infra, that there is insufficient evidence for a rational jury to find prior calculation and design, which would elevate the crime from murder to aggravated murder.

With regard to the "acquittal first" contention, the trial court did not expressly require the jury to acquit petitioner of aggravated murder and murder before considering his guilt of voluntary manslaughter. The Ohio Supreme Court dealt with a similar instruction in *State v. Thomas, 40 Ohio St.3d 213, 220, 533 N.E.2d 286 (1988).* The Court stated that, although such instruction is not proper, the instruction did not have a coercive effect on the jury because the instruction dealt primarily with the jury's inability to find an element of a greater offense. Similarly, the instruction in this case did not fundamentally deny petitioner a fair trial. See *Jamison v. Collins, 100 F. Supp.2d 647, 719 (S.D. Ohio 2000)* (holding virtually identical instruction did not deny petitioner a fair trial).

b. Flight Instruction

Petitioner next contends that the trial court denied him due process by providing the jury with a flight instruction. Petitioner claims this instruction impermissibly required the jury to find that petitioner possessed prior calculation and design in killing Alexander based on his flight from the scene, alleviating the state from so proving. Although respondent alleges this claim is procedurally defaulted, the Ohio Supreme Court held on direct appeal that, because trial counsel objected to the instruction, it was properly preserved for appeal. *State v. Taylor, 78 Ohio St.3d 15, 27, 1997 Ohio 243, 670 N.E.2d 82 (Ohio 1997).*

Because petitioner exited from the bar after shooting the victim, the prosecutor asked for and the trial court charged the jury on flight. The trial court instructed the jury as follows:

Now, in this case, there is evidence tending to indicate that the defendant fled from the vicinity of the alleged crime. In this connection, you are instructed that flight, in and of itself, does not raise a presumption of guilt, but unless satisfactorily explained, it tends to show consciousness of guilt or a guilty connection to the crime.

(Tr. 862).

On appeal, the Ohio Supreme Court held the instruction was proper, noting that the trial court merely instructed that flight tended to show consciousness of guilt, rather than required such a finding. *78 Ohio St.3d at 27.* Moreover, the court noted that because Taylor testified at trial, the trial court did not implicate his *Fifth Amendment* right not to testify with its "unless satisfactorily explained" language. Id. The petitioner cannot demonstrate that the Ohio Supreme Court unreasonably applied any United States Supreme Court precedent in its decision. Accordingly this instruction does not so infect the trial as to deny petitioner due process. *Drake v. Superintendent, Trumbull County Corr. Inst., 106 F.3d 400* (Table), [published in full-text format at *1997 U.S. App. LEXIS 1721], 1997 WL 14422,* at *7 (6th Cir. Jan. 14, 1997).

c. Aggravated Felony Instruction

After instructing the jury that they must determine whether Taylor previously was convicted of murder under the "repeat murder" specification, the trial court then told the jury it must once again find, pursuant to specification three in the indictment, whether Taylor previously was convicted of the murder. T. 875. Petitioner claims this repetition violated his due process right to a fair trial.

The Ohio Supreme Court analyzed this claim on direct appeal, concluding that although the duplicative instruction was improper pursuant to Ohio law, n4 it was harmless error because the inclusion of this instruction only disclosed to the jury information that it would have properly heard pursuant to the prior murder specification. *State v. Taylor, 78 Ohio St.3d 15, 25, 1997 Ohio 243, 676 N.E.2d 82 (Ohio 1997).* Moreover, the court concluded, Taylor intentionally chose to have the death penalty specification tried to the jury because he planned to testify during trial and knew the prosecution would undoubtedly raise the issue during his cross examination. Id.

> n4 Pursuant to Ohio law, a trial court may only charge the jury regarding the aggravated-felony specification when the defendant is indicted for an aggravated felony. *Ohio Rev. Code §§ 2929.11(B) (1), (B) (2) (b), (B) (3) (b), and (F).* Neither murder nor aggravated murder is an aggravated felony in Ohio. *Ohio Rev. Code § 2901.02(A).*

Although petitioner contends that the Ohio Supreme Court's holding is contrary to *Clemons v. Mississippi, 494 U.S. 738, 108 L. Ed. 2d 725, 110 S. Ct. 1441 (1990)* and *Stringer v. Black, 503 U.S. 222, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992)*, those cases are inapposite. Both Clemons and Stringer dealt with the circumstance where a jury sentenced

the defendant to death pursuant to two or more aggravating factors when one of those aggravating factors later was invalidated as unconstitutionally vague. These cases, therefore, are not authority for finding that the trial court's duplicative aggravated felony instruction violated the petitioner's constitutional rights.

d. Consideration of Life Sentence Instruction

Petitioner claims that the trial court improperly charged the jury regarding its sentencing determination.

The challenged instruction stated:

If all 12 members of the jury find, by proof beyond a reasonable doubt, that the aggravating circumstances which the defendant was found guilty of committing, outweighs the mitigating factors, then you must return such a finding to the Court.

I instruct you, as a matter of law, that, if you make such a finding, then you have no choice and must recommend to the Court that the sentence of death be imposed upon the defendant, Michael Taylor.

On the other hand, if, after considering all of the relevant testimony, other evidence, the statement of the defendant, and the arguments of counsel, you find that the State of Ohio failed to prove, beyond a reasonable doubt, that the aggravating circumstance which the defendant was found guilty of committing, outweighs the mitigating factors, then you will return your verdict reflecting your decision.

In this event, you will then proceed to determine which of the two possible life imprisonment sentences to recommend to the Court.

Tr. 971-72.

On direct appeal, the Ohio Supreme Court noted that Taylor had not properly preserved this claim for appeal because he both failed to object to it during trial and did not raise it to the Court of Appeals. *State v. Taylor, 78 Ohio St.3d at 28.* The court then addressed the merits of the claim, concluding that the trial court's instruction was not plain error. *Id. at 29.*

Petitioner claims that because the Ohio Supreme Court addressed this claim on its merits, his procedural default should be excused. In *Scott v. Mitchell, 209 F.3d 854, 866 (6th Cir. 2000)*, the Sixth Circuit noted that an alternative holding in which the state court performs a plain error analysis does not constitute a waiver of the state procedural bar preventing a habeas court from reviewing the claim. Moreover, in *Seymour v. Walker, 224 F.3d 542, 557 (6th Cir. 2000)*, the court explicitly rejected petitioner's assertion stating, "controlling precedent in our circuit indicates that plain error review does not constitute a waiver of state procedural default rules." The petitioner next contends he can demonstrate cause and prejudice to excuse any default based on trial counsel's ineffectiveness for failing to object to this instruction. As stated in claim one, however, the discreet ineffective assistance of counsel claim is procedurally defaulted because petitioner failed to raise it to the Ohio Court of Appeals. The Ohio Supreme Court conducted a plain error review of that claim. Because petitioner cannot successfully assert cause and prejudice to excuse the default of his ineffective assistance of counsel for failure to object to the jury instruction claim, he may not use it as cause to excuse the procedural default of this claim. *Carpenter v. Edwards, 529 U.S. 446, 146 L. Ed. 2d 518, 120 S. Ct. 1587 (2000).*

This claim would be without merit in any event. This charge is was modeled after *Ohio Revised Code § 2929.03(D)(2)*, which reads in pertinent part:

If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

Ohio Rev. Code § 2929.03(D)(2).

The Sixth Circuit recently issued an opinion seemingly in conflict with earlier sentencing unanimity instruction decisions. In those earlier decisions, such as *Coe v. Bell, 161 F.3d 320 (6th Cir. 1998)*, the court found that a sentencing instruction setting forth the statutory weighing process did not run afoul of the United States Supreme Court precedent set by *Mills v. Maryland, 486 U.S. 367, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1998)* and *McKoy v. North Carolina, 494 U.S. 433, 108 L. Ed. 2d 369, 110 S. Ct. 1227 (1990)*. In Mills and McKoy, the Court determined that sentencing instructions that require jurors to unanimously find and agree on specific mitigating factors before using those factors in the weighing process are unconstitutional. *Mills, 486 U.S. at 384*.

The Coe Court distinguished the Mills and McKoy sentencing instructions, noting that, "in Coe's case, by contrast, it is fairly clear that . . . the unanimity refers to the weighing process and not to the finding of a mitigating factor." *Coe, 161 F.3d at 338*. Thus, the Coe Court found

nothing constitutionally unsound when a sentencing instruction articulated the weighing process involved in reaching a verdict but did not specify how to find the existence of specific mitigating factors. Similarly, in *Scott v. Mitchell, 209 F.3d 854 (6th Cir. 2000)*, the Court found that a sentencing instruction substantially identical to Taylor's passed constitutional muster. n5 Finding that Scott's sentencing instruction was indistinguishable from the instruction provided in the Coe case, the Scott Court determined, as in Coe, that a jury instruction which requires unanimity only as to the overall weighing of mitigating factors and aggravating circumstances was constitutionally sound. *Id. at 875*. Finally, in *Roe v. Baker, 316 F.3d 557, 2002 WL 31426248, *5 (6th Cir. Oct. 31, 2002)*, a pre-*Anti-Terrorism and Effective Death Penalty Act* case, the Sixth Circuit found no constitutional violation when the sentencing court failed to instruct the jury that unanimity was not required to find for a life sentence. Citing Scott, Coe, and *Jones v. United States, 527 U.S. 373, 381-84, 144 L. Ed. 2d 370, 119 S. Ct. 2090 (1999)*, the court held in Roe that no such instruction was constitutionally required. Id.

> n5 The sentencing instruction in Scott, as quoted by that Court, reads:
>
> If all 12 members of the jury find, by proof beyond a reasonable doubt, that the aggravating circumstances which Jay Scott was found guilty of committing outweigh the mitigating factors, then you must return such a finding to the Court. I instruct you as a matter of law that if you make such a finding, then you have no choice and must recommend to the Court that the sentence of death be imposed upon the defendant, Jay Scott. [. . .]
>
> On the other hand, if after considering all of the relevant evidence raised at trial, the testimony, other

> evidence, the statement of Jay Scott, and the arguments of counsel, you find that the State of Ohio failed to prove that the aggravating circumstances which the defendant, Jay Scott, was found guilty of committing, outweigh the mitigating factors, then you will return your verdict reflecting your decision.
>
> In this event, you will then proceed to determine which of two possible life imprisonment sentences to recommend to the Court. [. . .]
>
> *209 F.3d at 873.*

Very recently, however, a panel of the Sixth Circuit determined that a similar unanimity instruction *was* constitutionally infirm. *Davis v. Mitchell, 318 F.3d 682, 2003 WL 222741 (6th Cir. Feb. 4, 2003).* There the Court found that the instruction both violated the Mills mandate that jurors need not unanimously find specific mitigating factors, and that the charge improperly required the jury to first "acquit" the petitioner of the death penalty before choosing a life sentence. The charge at issue, virtually identical to those recited above, reads as follows:

> If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances which Wiley Davis, Jr. was found guilty of committing outweigh the mitigating factors, if any, then you must return such finding to the Court.
>
> I instruct you as a matter of law that if you make such a finding then you have no choice and must recommend to the Court that the sentence of death be imposed upon the defendant, Wiley Davis, Jr.
>
> On the other hand, if after considering all of the relevant evidence raised at trial, the testimony, other evidence, the

unsworn statement of Wiley Davis, Jr. and the arguments of counsel, you find that the State of Ohio failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant, Wiley Davis, Jr., was found guilty of committing, outweigh the mitigating factors, then you will return your verdict reflecting your decision; that is, you must find that the State has failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant was found guilty of committing outweigh the mitigating factors.

In this event you will then proceed to determine which of the two possible life imprisonment sentences to recommend to the Court.

*318 F.3d 682, at *1.*

The court in Davis found three defects in this charge: 1) silence on the lack of unanimity; 2) the requirement that the jury first "acquit" the petitioner of the death penalty before it could consider a life sentence (a so-called "acquittal-first" instruction); and, 3) the portion of the charge in which the trial court stated that all twelve jurors must be in agreement. *318 F.3d 682, at *6.* These facets of the charge, the court held "would have led a reasonable jury to apply an unconstitutional standard of unanimity at all stages of the deliberative process." Id. The Davis court did not distinguish—indeed it failed to cite—Coe, Scott, and Roe.

Guidance to resolve the conflict between Davis and the court's earlier published decisions is found in the Sixth Circuit's rules of practice, which state: "Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court." Sixth Cir. Internal Operation Proc. 206(c). Moreover, in *United States v. Smith, 73 F.3d*

1414 (6th Cir. 1996) the Court held that "[a] panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." *Id. at 1418* (quoting *Salmi v. Sec'y of Health and Human Serv., 774 F.2d 685, 689 (6th Cir. 1985)*); see also *Roe v. Baker, 316 F.3d 557, 2002 WL 31426248, at *13 (6th Cir. Oct. 31, 2002)* (Clay, J., concurring, writing separately to express continued objection to prior Sixth Circuit decision but noting its binding effect on resent case). Accordingly, *Coe*, *Scott*, and *Roe* remain controlling authority in determining that Taylor's sentencing instruction was constitutionally sound.

Finally, petitioner attempts to portray the Scott decision on this issue as dicta, claiming that *Mapes v. Coyle, 171 F.3d 408 (6th Cir. 1999)*, should control. This depiction of Scott and Mapes is inaccurate. In Scott, the Sixth Circuit determined that the claim alleging improper jury instructions was procedurally defaulted. It addressed the merits of the claim, however, not, as petitioner suggests, in dicta, but "to clarify our precedents governing sentencing-phase instructions in jury unanimity . . ." *209 F.3d at 873*. Alternatively, the Scott court found that its decision was not contrary to Mapes, because the court's opinion regarding unanimous jury instructions in Mapes was dicta. *Id. at 875*. Thus, as *Scott* teaches, the trial court's unanimity instruction was not constitutionally improper.

e. Reasonable Doubt Instruction

Finally, the petitioner challenges the propriety of the trial court's instruction regarding reasonable doubt. In that instruction the trial court stated:

Reasonable doubt is present when you, the jurors, after you have carefully considered and compared all evidence, cannot say that you are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt.

Proof beyond a reasonable doubt is proof of such a character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs.

Tr. 857-58.

On direct appeal, the Ohio Supreme Court conducted a plain error review of this claim because Taylor failed to object to the instruction during trial and failed to raise it to the Court of Appeals. *State v. Taylor, 78 Ohio St.3d at 28.*

The petitioner contends he can demonstrate cause and prejudice to excuse any default based on ineffective assistance of counsel. In this instance, petitioner properly raised an ineffective assistance of counsel claim for failure to object to the reasonable doubt instruction to the Ohio Supreme Court. Thus, the claim is properly exhausted and petitioner may use it to assert cause to excuse his procedural default. *Murray v. Carrier, 477 U.S. 478, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986).*

The analysis does not end, however, with the habeas court's determination that the petitioner has properly exhausted his or her ineffective assistance of counsel claim. To be successful in asserting that ineffective assistance of counsel may constitute cause to excuse procedural default, a habeas petitioner first must demonstrate "that [he] received ineffective assistance of . . . counsel that rose to the level of a violation of [his] *Sixth Amendment* rights." *Seymour v.*

Walker, 224 F.3d 542, 550 (6th Cir. 2000). As is demonstrated in petitioner's first claim for relief, petitioner cannot so demonstrate. Thus, he cannot use ineffective assistance of counsel as cause to excuse the procedural default of this claim.

This claim lacks merit in any event. The instruction the trial court provided to the jury was Ohio's statutory definition of reasonable doubt. *Ohio Rev. Code § 2901.05.* The Sixth Circuit has ruled that Ohio's statutory definition of reasonable doubt does not offend due process. *Thomas v. Arn, 704 F.2d 865, 867-69 (6th Cir. 1983).* To offend due process, the instruction must be of the type that could mislead the jury into finding no reasonable doubt when in fact there was some. *Id. at 868; Holland v. United States, 348 U.S. 121, 140, 99 L. Ed. 150, 75 S. Ct. 127 (1954).* In the present case the trial court merely read the statutory jury instruction that has been found constitutional. The instruction cannot be considered misleading.

3. Prosecutorial Misconduct

a. Inflammatory Remarks During Cross-examination

The petitioner claims that the prosecutor improperly inflamed the passions of the jury during the cross-examination of defense witness, David Roseborough and the petitioner. After several attempts to elicit from Roseborough his exact location at the time petitioner shot Alexander, the prosecutor became somewhat confused, evoking some apparent laughter from members of the courtroom audience. The prosecutor ostensibly became annoyed by this laughter and commented, "I'll tell you what—they won't be laughing for long." Tr. 685. Defense counsel immediately objected to this comment and the trial court instructed the jury to disregard it. Id.

Additionally, when answering the prosecutor's questions on cross-examination, the petitioner repeatedly used the word "sir." The prosecutor took issue with this usage, stating, "And you don't have to keep calling me 'sir.' I'm sure you wouldn't call me that if you saw me in the street." Tr. 775. Finally, in response to the prosecutor's accusation that petitioner and Roseborough "concocted" their testimony, the petitioner stated, "You should be working for Walt Disney, sir. You have quite an imagination—," the prosecutor retorted, "And you should have that bible in your hand when you're out there killing people—." Tr. 782. At the conclusion of both these statements, defense counsel objected, prompting the trial court immediately to instruct the jury to disregard the prosecutor's statements.

Respondent asserts that all of the above claims are procedurally defaulted because the petitioner did not raise them at any juncture in state court. Petitioner counters that, although he did not raise a prosecutorial misconduct claim based on the above-cited prosecutorial comments, he did raise a prosecutorial misconduct claim to the Ohio Supreme Court. Further, petitioner claims that, so long as he "fairly presented" a claim to state court, he has satisfied the exhaustion requirement pursuant to *Rose v. Lundy, 455 U.S. 509, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (1982).*

While petitioner's assertion is not invalid, he fails to acknowledge a corollary to the exhaustion requirement—"that the doctrine of exhaustion requires that a claim be presented to the state courts under the same theory in which it is later presented to federal court." *Wong v. Money, 142 F.3d 313, 322 (6th Cir. 1998)*; see also *Alley v. Bell, 307 F.3d 380, 386 (6th Cir. 2002)* (holding substance of claim must have been presented to state court). Because he cannot demonstrate cause for failing to raise this claim in state court, the above claims are procedurally defaulted.

These claims lack merit in any event. To successfully assert a prosecutorial misconduct claim in a habeas proceeding it "is not enough that the prosecutors' remarks were undesirable or even universally condemned. The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 106 S. Ct. 2464 (1986)* (quoting *Donnelly v. DeChristoforo, 416 U.S. 637, 642, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974)).* This question must be answered in light of the totality of the circumstances in the case. *Lundy v. Campbell, 888 F.2d 467, 473 (6th Cir. 1989).* The prosecutor's comments must be so egregious as to render the trial fundamentally unfair. *Fussell v. Morris, 884 F.2d 579 (Table), 1989 WL 100857, at *4 (6th Cir. Sept. 1, 1989).*

Recently, the Sixth Circuit reaffirmed its prior jurisprudence on prosecutorial misconduct. *Boyle v. Million, 201 F.3d 711 (6th Cir. 2000).* The court determined that a district court should first determine whether the challenged statements were, in fact, improper, and if so, to determine whether the comments were "flagrant," thus requiring reversal. *Id. at 717.*

Flagrancy is determined by an examination of four factors: 1) whether the statements tended to mislead the jury or prejudice the defendant; 2) whether the statements were isolated or among a series of improper statements; 3) whether the statements were deliberately or accidentally before the jury; and 4) the total strength of evidence against the accused.

Id. (internal quotation marks and citation omitted).

While these statements were indeed improper, they were too isolated to prejudice the defendant. Moreover, because the trial court sustained petitioner's objection to these

statements, the jury must be presumed to have disregarded them. *Greer v. Miller, 483 U.S. 756, 767 n.8, 97 L. Ed. 2d 618, 107 S. Ct. 3102 (1987)* ("We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions"); *United States v. Ford, 872 F.2d 1231, 1239 (6th Cir. 1989)* (same). Petitioner has not overcome this presumption.

b. Guilt Phase Closing Argument

Petitioner alleges that the prosecutor made several improper statements during the guilt phase closing argument. First, petitioner takes issue with the prosecutor's statement that "it is too bad Marion Alexander isn't here. He could give you his version of what happened." Tr. 810. Petitioner also alleges that the prosecution attempted to obtain a guilty verdict based on petitioner's association with Roseborough when he stated,

Now, his compadrie, Roseborough, is sitting back there in the back, in the middle against the wall. What do you think about him? What did you think about his attitude; his demeanor?

I'm sure each of you saw how he stared me down, and the little scene he made right over here when he got to my chair. He looked at me, and he glared at me. That was supposed to frighten me, and he was just glaring.

How do you think Donny felt, and if they would do that in this courtroom, what do you think they did in that bar?

Tr. 812-13. Additionally, in defense counsel's closing argument, counsel stated that, although the state had

introduced evidence that a jacket that Alexander wore when murdered was hole-ridden, the state failed to introduce the jacket itself during trial.

In the state's closing argument, the prosecutor countered that, if defense counsel had wanted, they could have used their subpoena power to introduce it. The trial court sustained defense counsel's objection to this statement. Tr. 850. Petitioner claims that this statement constituted the prosecution's personal knowledge that this un-admitted evidence existed. Finally, petitioner alleges prosecutorial misconduct because the prosecutor commented, in rebuttal to defense counsel's assertion that the victim had consumed alcohol on the night of the murder, that the state did not have the identical opportunity to examine petitioner and determine whether he was under the influence of drugs or alcohol when the murder occurred. The trial court sustained defense counsel's objection to the statement and instructed the jury to disregard it. Tr. 852-53.

Respondent alleges that each of these claims is procedurally barred because the petitioner failed to raise them at any juncture in state court. As discussed above, petitioner cannot overcome these allegations. Thus, they are procedurally defaulted and should not be considered on the merits.

If they could be so considered, the petitioner would not be entitled to relief. First, the comment regarding Alexander's inability to recount his version of events was not improper. Rather, it was a factual statement about which the prosecutor could appropriately comment. While the prosecutor's attempt to impugn the petitioner with the actions of Roseborough was not proper, it was not particularly prejudicial considering that the prosecution alleged that Roseborough acted in conjunction with petitioner. The prosecution's comments on the defense's subpoena power to

introduce Alexander's jacket and inability to medically examine the petitioner on the night of the murder also were improper. These comments were isolated, however, and prompted the trial court to sustain defense counsel's objection to them. The presumption that the jury could not disregard these statements has not been overcome.

c. Mitigation Phase Cross-examination

Petitioner next objects to the prosecutor's cross-examination of Dr. Rita Politzer, petitioner's psychological expert. First, petitioner objects to the prosecution's cross-examination regarding whether he could adjust to prison life. Tr. 912. Next, the prosecution questioned the authenticity of the Roseborough statement that Politzer reviewed. Finally, the prosecution asked Politzer who had sought and paid for her services. Tr. 919. Although the trial court initially overruled defense counsel's objection to this line of questioning, the trial court sustained the objection, interrupting Politzer when she stated, "It was my understanding that the Court had asked [defense counsel] to allow for an expert witness, and that the original expert had not—" Tr. 919-20.

The petitioner also claims prosecutorial misconduct occurred during the state's cross-examination of Robert Doss, petitioner's minister. In response to Doss's statement that he did not believe in the death penalty, the prosecutor questioned whether Doss espoused the portion of the Bible calling for "an eye for an eye." Tr. 934. The prosecution also asked Doss if he thought "it was right for Donny Alexander to be killed" and whether he thought "[Donny] wanted to live." Tr. 935-36. The trial court sustained objections to both statements.

As with the previous prosecutorial misconduct claims, the above claims were never presented to the Ohio courts. Thus, they are procedurally defaulted.

These claims lack merit in any event. In regards to Politzer's cross-examination, the prosecutor's question regarding her certainty of petitioner's adjustment to prison life was not improper. Although the remaining prosecutorial statements—the questioning of the authenticity of the Roseborough statement she examined as well as who had hired Politzer—were improper, they were not "flagrant." They were somewhat isolated and, in the instance in which the prosecutor asked who had hired Politzer, there is no indication that the prosecution meant to elicit a response indicating that here had been another expert on the case.

The prosecution's cross-examination of Doss was not, in whole, improper. After proclaiming his religious beliefs during direct examination, it was not improper for the prosecution to further explore them for inconsistencies, impeaching Doss thereby. Although the prosecution should not have asked Doss whether Alexander should have been killed or wanted to live, when viewed in the context of the entire cross-examination, these statements were not repetitive, nor did they deny petitioner a fair trial.

D. Mitigation Phase Closing Argument

Finally, petitioner claims that the prosecutor unfairly prejudiced the mitigation phase of his trial. First, the prosecutor questioned the petitioner's use of selected quotes from the Bible, overlooking the statement "Thou shalt not kill." Tr. 962. The prosecutor also stated that Alexander would have relished the opportunity to tell petitioner not to kill him as petitioner's family requested of the jury during mitigation. Tr. 960. The trial court sustained an objection to this statement. Finally, regarding the jury's duty to weigh the

evidence, the prosecutor stated, "One of the mitigating factors alluded to by defense counsel was whether the victim of the offense induced or facilitated what happened. You have to weigh that in relation to the defendant's two prior—" Tr. 960-61. The trial court sustained defense counsel's objection to this statement.

Petitioner raised this claim to the Ohio Supreme Court on direct appeal. That court rejected petitioner's claims, stating: "Evidence or comments about crime victims, including the impact of a crime on victims, do not offend the United States or Ohio Constitutions, and did not harm appellant." *State v. Taylor, 78 Ohio St.3d 15, 28, 1997 Ohio 243, 676 N.E.2d 82 (1997)* (citing *Payne v. Tennessee, 501 U.S. 808, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991)* (further citations omitted). The Ohio Supreme Court further found that the prosecutor had not improperly commented on nonstatutory aggravating factors by referring to petitioner's prior murder convictions because "the charged death-penalty specification alleged appellant had previously been convicted of murder." *Id.* Petitioner cannot demonstrate that the Ohio Supreme Court's opinion was clearly contrary to *Payne v. Tennessee, supra*, (holding *Eighth Amendment* does not bar, per se, prosecutorial comments on victim impact), or any other United States Supreme Court precedent. The petitioner is not entitled to relief on this claim.

4. Ineffective Assistance of Appellate Counsel

Petitioner claims that he received ineffective assistance of appellate counsel in the Ohio Supreme Court because counsel failed to raise the issue of the trial court's improper voluntary manslaughter instruction raised, supra, in his second claim.

This claim is procedurally defaulted because the petitioner did not raise it in any state court. Petitioner asserts that he can overcome this procedural default with cause and

prejudice. Specifically, petitioner alleges that the Ohio Supreme Court's holding in *State v. Buell, 70 Ohio St.3d 1211, 1994 Ohio 475, 639 N.E.2d 110 (1994)* provides him with cause. In that case, the court held that a criminal defendant's appeal to the Ohio Supreme Court was a second appeal as of right. n6 The Buell court then found that "'the right to appointed counsel extends to the *first* appeal as of right, *and no further*.'" Id. (quoting *Pennsylvania v. Finley, 481 U.S. 551, 555, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1987))* (emphasis in original).

> n6 With the elimination of intermediate appellate review, the Ohio Supreme Court has promulgated Rule XI(5), which permits a capital defendant to file a claim of ineffective assistance of appellate counsel in the Ohio Supreme Court. This rule is not applicable to Taylor, however, as it applies only to cases in which the offense was committed on or after January 1, 1995.

Citing this language, the petitioner claims that it would have been futile to have asserted ineffective assistance of appellate counsel because no Ohio court would have considered it. Futility, however, cannot serve as cause for failing to raise this argument in state court. *Engle v. Isaac, 456 U.S. 107, 71 L. Ed. 2d 783, 102 S. Ct. 1558 (1982).* As the Engle Court stated:

The futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to his claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid.

Id. at 130. Although the petitioner in *Engle* was challenging the need to object to a self-defense instruction during trial, the Engle Court's reasoning is equally applicable where, as here, a petitioner claims that he or she need not present a claim of effective assistance of appellate counsel on direct appeal in the Ohio Supreme Court to any state court because the ate courts would have rejected it under Buell.

Even if petitioner could establish that Buell serves as sufficient cause to excuse him from raising ineffective assistance of appellate counsel for failure to raise the voluntary manslaughter instruction to the Ohio Supreme Court, he could not establish, as he must under *Strickland*, that counsel's failure to preserve this claim for appellate review was prejudicial to him, as is described below in the merit review of this claim.

Regardless of its defaulted status, the petitioner would not have prevailed on this claim. Petitioner asserts that, contrary to the Ohio Supreme Court's opinion in Buell, he is entitled to constitutionally effective assistance of counsel to that court on direct appeal. It is not necessary to decide this issue, however, as petitioner cannot establish that he suffered prejudice from appellate counsel's allegedly deficient performance. Because "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies," *Strickland, 466 U.S. at 697*, it is possible to disregard this claim based on the fact that it did not prejudice the petitioner.

As stated in claim two, supra, petitioner's claim that the trial court's improper jury instruction prejudiced him is without merit. Because this claim is without merit, counsel's failure to raise the jury instruction issue to the Ohio Supreme Court does not undermine the confidence in the outcome of petitioner's direct appeal. Without establishing prejudice, the

petitioner's claim must fail pursuant to *Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).*

5. Insufficient Evidence to Prove Prior Calculation and Design

The petitioner was convicted of aggravated murder, defined in *O.R.C. § 2903.01(A)*, which states: "No person shall purposely, and with prior calculation and design, cause the death of another." The Revised Code distinguishes between aggravated murder and murder, which is to "purposely cause the death of another." *O.R.C. § 2903.02(A).* Only the element of prior calculation and design distinguishes the two provisions, with each requiring that the homicide occur purposely.

Current *§ 2903.01(A)* replaced the former premeditated murder provision when the General Assembly revised Ohio's Criminal Code in 1973. The legislative history, as found in the Commentary to *§ 2903.01(A)*, states:

The first part of this section restates the former crime of premeditated murder so as to embody the classic concept of the planned, cold-blooded killing while discarding the notion that only an instant's prior deliberation is necessary. By judicial interpretation of the former Ohio law, murder could be premeditated even though the fatal plan was conceived and executed on the spur of the moment. See, *State v. Schaffer, 113 Ohio App 125, 177 N.E.2d 534 (Lawrence Co App, 1960).* The section employs the phrase, "prior calculation and design," to indicate studied care in planning or analyzing the means of the crime, as well as a scheme compassing the death of the victim. Neither the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves, but they must amount to more than momentary deliberation.

(Emphasis supplied).

The Ohio Supreme Court underscored the importance of the 1973 revision of Ohio's aggravated murder statute in *State v. Cotton, 56 Ohio St.2d 8, 11, 381 N.E.2d 190 (1978)*:

The apparent intention of the General Assembly in employing [the] phrase ["prior calculation and design"] was to require more than the few moments of deliberation permitted in common law interpretations of the former murder statute, and to require a scheme designed to implement the calculated decision to kill. Thus, instantaneous deliberation is not sufficient to constitute "prior calculation and design."

(Emphasis supplied).

The standard for prior calculation and design is higher, and more rigorous than the standard of premeditation which it replaced:

Prior calculation and design sets up a more demanding standard than the old first degree murder standard of "deliberate and premeditated malice." Prior calculation and design requires the accused to have killed purposefully after devising a plan or scheme to kill. There must be some kind of studied analysis with its object being the means by which to kill. The kind of momentary deliberation or instantaneous premeditation that was the accepted standard under the old statute, . . . , is no longer sufficient or acceptable.

State v. Jenkins, 48 Ohio App.2d 99, 101-02, 355 N.E.2d 825 (1976) (citations and footnotes omitted) (emphasis supplied). Accord, *State v. Robbins, 58 Ohio St.2d 74, 78, 388 N.E.2d*

755 (1979) ("prior 'calculation and design' is a more stringent element than the 'deliberate and premeditated malice' which was required under prior law.").

There is, however, no "bright-line test" that "emphatically distinguishes between the presence or absence" of "prior calculation and design." Yet "'prior calculation and design' is a more stringent element than the 'deliberate and premeditated malice' *** required under prior law." "Instantaneous deliberation is not sufficient ***." "'Prior calculation and design' requires 'a scheme designed to implement the calculated decision to kill.'"

State v. Coley, 93 Ohio St.3d 253, 263, 2001 Ohio 1340, 754 N.E.2d 1129 (2001) (citations omitted).

On direct review of the petitioner's conviction, the Ohio Supreme Court stated that courts are to look to three primary factors when determining whether prior calculation and design exists in a particular case: 1) whether the victim and accused knew each other and, if so, whether their relationship was strained; 2) whether the accused chose the murder site or weapon before the murder; and 3) whether the killing was a drawn-out act or an "eruption of events." *State v. Taylor, 78 Ohio St.3d 15, 19, 1997 Ohio 243, 676 N.E.2d 82 (1997)* (citing *State v. Jenkins, 48 Ohio App.2d 99, 102, 355 N.E.2d 825 (Ohio App. 1976)).*

The time taken by the defendant to perform the pertinent acts—"more than a few moments of deliberation," *Cotton, 56 Ohio St.2d at 11*—is perhaps the element least susceptible of bright-line demarcation. "The length of time the offender takes to ponder the crime beforehand" is, however, not alone a critical factor. *State v. D'Ambrosio, 67 Ohio St.3d 185, 196, 1993 Ohio 170, 616 N.E.2d 909 (1993)* (quoting *Cotton, 56 Ohio St.2d at 11*). It is clear, accordingly, that, "a prolonged period of deliberation is unnecessary to meet [the]

element" of prior calculation and design. *State v. Quinones, 1982 Ohio App. LEXIS 11970, 1982 WL 5957, *11 (Ohio App. 8 Dist., Cuyahoga County, Oct 14, 1982).* The crucial factor is whether there was sufficient time, under all the circumstances, for the accused to plan the killing:

Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified.

Cotton, 56 Ohio St. 2d at 8 (Syllabus P 3).

In view of the understandable lack of a bright line rule governing determinations of whether the proof shows prior calculation and design, Ohio courts have consistently considered various factors in addition to those—the defendant's relationship with the victim, the thought given by the defendant to the means and place of the crime, and the timing of the pertinent events—recited in *Taylor, 78 Ohio St.3d at 19*, when determining whether the defendant engaged in prior calculation and design.

Among these other, frequently considered factors are:

--whether the defendant at any time expressed an intent to kill. See, e.g., *State v. Cassano, 96 Ohio St.3d 94, 108, 2002 Ohio 3751, 772 N.E.2d 81 (2002)* (defendant made several statements regarding harming victim); *State v. Sowell, 39 Ohio St.3d 322, 333, 530 N.E.2d 1294 (1988)* (defendant announced his intention to get his gun and shoot the victim); *State v. Mardis, 134 Ohio App.3d 6, 19, 729 N.E.2d 1272 (1999)* (defendant told victim "he would blow his motherf *** head off"); *State v. Wages, 87 Ohio App.3d 780, 791,*

623 N.E.2d 193 (1993) (sometime prior to murder, defendant stated he should kill the victim).

--there was a break or interruption in the encounter, giving time for reflection.See *State v. Christian, Cuyahoga County App. No. 79789, 2002 Ohio 1272, 2002 WL 451013*, at *3 (Ohio Ct. App. Mar.21, 2002) (defendant departed, drove around the block and returned to the scene, taking his gun from the glove compartment); *State v. Morris, Cuyahoga County App. No. 76889, 2000 Ohio App. LEXIS 4181, 2000 WL 1299551* (Ohio Ct. App. Sept. 14, 2000) (defendant left the scene and returned with weapons); *State v. Camp, Cuyahoga County App. No. 74562, 1999 Ohio App. LEXIS 3697, 1999 WL 608811*, at *4 (Ohio Ct. App. Aug. 12, 1999) (defendant returned to the scene after several hours and shot the victim).

--whether the defendant displayed a weapon from the outset. *State v. Palmer, 80 Ohio St.3d 543, 568-69, 1997 Ohio 312, 687 N.E.2d 685 (1997)* (after minor traffic accident, defendant exited his vehicle with a loaded, cocked firearm; before each of three shots, defendant had to cock his weapon before firing); *State v. Mardis, 134 Ohio App.3d 6, 18, 729 N.E.2d 1272 (1999).*

--whether the defendant retrieved a weapon during the encounter. See, e.g., *State v. Sowell, 39 Ohio St. 3d at 333* (defendant announced his intention to get his gun and shoot the victim); *State v. Robbins, 58 Ohio St.2d 74, 78-79, 388 N.E.2d 755 (1979)* (defendant went to his apartment after striking his victim and obtained a weapon); *State v. Richardson, 103 Ohio App.3d 21, 25, 658 N.E.2d 321 (1995)*; State v. Markland, No. 2001*CA00356, 2002 Ohio 5104, 2002 WL 31151177*, at *5 (Ohio Ct. App. Sept. 23, 2002); *State v. Stroud, Cuyahoga County App. No. 74756, 1999 Ohio App. LEXIS 5080, 1999 WL 980627*, at *11 (Ohio Ct. App.

Oct. 28, 1999); *State v. Long, 1997 Ohio App. LEXIS 416,* No. 96*APA04-511, 1997 WL 52911,* at *10 (Ohio Ct. App. Feb. 06, 1997).

--the extent to which the defendant pursued the victim. *State v. Claytor, 61 Ohio St.3d 234, 241, 574 N.E.2d 472 (1991)* (defendant pursued wounded victim and shot him in the face); *State v. Freeman, 2002 Ohio 4572, 2002 Ohio 4572, 2002 Ohio App. LEXIS 4707, No. 80720, 2002 WL 2027270, at *3 (Ohio Ct. App. Sept. 5, 2002)* (defendant followed wounded victim and fired second shot as he lay helpless on the ground); *State v. Norman, 2000 Ohio App. LEXIS 1556, No. 76140, 2000 WL 354743,* at *7 (participants in fight fled when defendant drew his weapon; defendant pursued his unarmed victim, wounded him, and returned to where he lay firing fatal shots from pointblank range); *Stroud, 1999 Ohio App. LEXIS 5080, 1999 WL 980627,* at *11-12 (after heated discussion, defendant obtained a firearm, chased victim, and reloaded as he lay wounded before him).

--the number of shots fired. *Cotton, 56 Ohio St. 3d at 9* (defendant fired numerous shots); *Norman,2000 Ohio App. LEXIS 1556, 2000 WL 354743,* at *7 (same); *Stroud, 1999 Ohio App. LEXIS 5080, 1999 WL 980627,* at *11-12 (defendant reloaded as victim lay wounded before him); *State v. Douglas, 1992 Ohio App. LEXIS 5181, No. 15479, 1992 WL 281346* (Ohio Ct. App. Oct. 7, 1992) (defendant and companion called victim to their car and defendant shot him repeatedly); *State v. Moran, 1983 Ohio App. LEXIS 13776, No. 45879, 1983 WL 2712,* at *2 (Ohio Ct. App. Oct. 27, 1983) (defendant fired at least seven shots).

Ohio courts have, however, held that mere possession of a weapon is not, without more, evidence of prior calculation and design. *State v. Davis, 8 Ohio App.3d 205, 207, 8 Ohio B. 276, 456 N.E.2d 1256 (1982)* ("The mere fact that defendant was carrying a gun on this occasion but was not

carrying a gun on some earlier visit to a different bar is not sufficient to demonstrate a prior calculation and design to kill someone at this bar."); *State v. Johnson,1998 Ohio App. LEXIS 2069,* No. 97*APA03-315, 1998 WL 226441,* at *6 (Ohio Ct. App. May 5, 1998) ("That defendant had a gun with him .... is not, by itself, evidence of prior calculation and design, given the testimony offered by defendant's girlfriend that he 'sort of' frequently carried a weapon"); *State v. Carter,1987 Ohio App. LEXIS 9556, No. 52969, 1987 WL 19869,* at *2 (Ohio Ct. App. Nov. 12, 1987).

The only direct evidence of prior calculation and design can be found in the testimony of the eyewitnesses. The State called three eyewitnesses: an off-duty barmaid, Darlene Youngblood, the barmaid working that evening, Debra Lymore, and a friend of the victim, Denise Shepard. In addition to the petitioner, the defense called two eyewitnesses: Michael Roseborough and Sandra Paul, who had gone to the bar with the petitioner.

All the witnesses agreed that the shooting occurred very soon after Ms. Paul went to the jukebox to play a record. The victim, who was sitting at a "piano" bar apart from the bar at which the petitioner was sitting, asked Ms. Paul to play a recording. The petitioner objected to this request. Words were exchanged. Ms. Paul returned to her seat. The petitioner said to leave. Ms. Paul got up and headed toward the door. Mr. Roseborough walked to the jukebox, and was behind the victim. The petitioner stood up, started toward, and then turned away from the door toward the victim. Some more words were exchanged. As the victim raised his hands, the petitioner started shooting him.

There is also no dispute that the victim and Ms. Paul had had a prior sexual relationship, and that the petitioner was aware of that relationship.

The jury rationally could find that the initial shots knocked the victim down, and he tried to crawl away from the petitioner. The petitioner stood over the victim and continued shooting the victim four times in the back as he lay wounded at the petitioner's feet.

The testimony of the eyewitnesses disagreed, however, with regard to what, if anything, preceded the events at the jukebox.

Nothing in the testimony of the State's three eyewitnesses gives any indication of any contact, much less any confrontation, between the petitioner and the victim before Ms. Paul went to the jukebox. According to Ms. Youngblood, the off-duty barmaid, the victim, after coming into the bar, had joined her and Ms. Shepard at one end of the bar. The victim served himself a drink, paid for it, and sat down by himself at the piano bar. He sat there alone, not talking to anyone, Ms. Youngblood estimated, for five to ten minutes (Tr. 474-75) or ten to fifteen minutes or "15 to 20 minutes or more" (Tr. 478) before Ms. Paul approached the jukebox. (Tr. 445). He had not said anything to the petitioner or Ms. Paul before Ms. Paul went to the jukebox. (Tr. 498-99).

Ms. Lymore, the barmaid on duty that evening, testified that when the victim had gotten himself a drink, he had been "pretty close" to the petitioner and Ms. Paul, but they had not talked at that time. (Tr. 522-23, 524). It "was way before anything" (Tr. 524) that the victim had gotten his drink and gone to the piano bar.

The victim's friend, Ms. Shepard, likewise testified that the victim got himself a drink and "just sat down and started drinking his drink" without talking to anyone. (Tr. 532). Ms. Shepard then heard the victim say something to the petitioner, and she headed for the bathroom. (Tr. 533). She

was in the bathroom "maybe two to three minutes." (Tr. 534). While there she heard "nothing at all." (Id.). When she came out of the bathroom, she saw the victim, shot, lying on the ground.

One of the defense witnesses, David Roseborough, testified that the victim flashed his money and taunted the petitioner. But he testified that the victim had done so after Ms. Paul had headed for the jukebox. (Tr. 664-67). Thus, the state's eyewitnesses and one of the defense witnesses did not testify about any conversation or contact, much less a confrontation, between the petitioner and the victim before Ms. Paul went to the jukebox.

Ms. Paul and the petitioner, in contrast, testified that the victim had been boisterous and aggressive before Ms. Paul had gone to the jukebox. According to Ms. Paul, the victim, while standing at the bar, pulled out a large wad of money, which she estimated to be about $2,000, and offered to buy drinks for everybody in the bar. The petitioner, according to Ms. Paul, demurred. (Tr. 701-02). Then the victim sat at the piano bar. Ms. Paul asked the petitioner for a dollar to play the jukebox. When she went to the jukebox, the further verbal exchange ensued, leading to the victim's death.

During the verbal exchange, Ms. Paul testified, the victim said, among other things, "Bitch, didn't I tell you not to bring this mother fucker up here in my bar?" (Tr. 705). Ms. Paul testified that she and the petitioner had previously met the victim at the same bar. On that occasion, Ms. Paul had told the victim that the petitioner was her "man," and he had said he was happy for her. "But," he had also said, according to Ms. Paul, "don't be bringing him in my bar." (Tr. 708).

Ms. Paul testified that she had not told the petitioner about that statement before the shooting. (Tr. 709). She also acknowledged, however, that she had told the police in a

post-shooting interview, that the petitioner "didn't much care" for the victim (Tr. 720), whom he had met, she testified, three times before the shooting. (Tr. 718). Ms. Shepard (who herself had been sexually involved with the victim) testified that the day after the shooting she had asked Ms. Paul why the petitioner had shot the victim, and Ms. Paul had said, "Because my man was jealous of Donny [the victim]." (Tr. 795).

Ms. Paul testified that she and the defendant got up to leave. (Tr. 727). Once outside, she heard shots. She had not realized the defendant was not with her as she left the bar. (Tr. 728). She had been outside "maybe a minute" when she first heard the shots. (Tr. 730). As she turned to re-enter the bar, the petitioner was coming out of the bar.

As had Ms. Paul, the petitioner testified that before the jukebox incident the victim had gone behind the bar and taunted him, showing a big roll of money and trying to "belittle" him. (Tr. 751-52). Then the victim went to the piano bar (Tr. 752-53), staring at, but not talking to the petitioner and Ms. Paul. (Tr. 753). In the meantime, the petitioner and Ms. Paul danced, after which he said he wanted to leave. She asked for a dollar for the jukebox (Tr. 755), which led to the further confrontation and shooting.

The petitioner testified that he had earlier seen a pistol in the victim's belt, and that he thought that the victim was drawing his pistol as he was leaving. He claimed he shot the victim in self-defense. No pistol was found; nor was a roll of money found on the victim after the shooting. The jury disbelieved, and rationally could disbelieve, the petitioner's claim of self-defense.

From earlier contacts with the victim before the night of the shooting, the petitioner testified, he thought the victim had a "nasty attitude." (Tr. 743).

In closing argument, the prosecutor stated that the victim had been minding his own business before the jukebox incident. (Tr. 810). Like its three eyewitnesses and the defense witness Roseborough, the State's closing argument did not assert that there had been a precedent encounter, the flashing by the victim of a roll of money, or his taunting of the petitioner. This conformed with the prosecutor's depiction during the State's opening statement that the confrontation originated with the victim's asking Ms. Paul to play a song on the jukebox— "That's what this is all about." (Tr. 398).

Although the State at no time claimed that there had been a prior encounter between the victim and petitioner before Ms. Paul went to the jukebox, and its witnesses testified that there had been no such encounter, the jury could have found, based on the testimony of Ms. Paul and the petitioner, that there had been such an encounter. As discussed below, I conclude, however, that no rational juror could have found beyond a reasonable doubt that any such prior encounter, even if it occurred (as the State manifestly did not believe), evoked prior calculation on the petitioner's part. As also explained below, I conclude that the pertinent time frame for assessing whether the petitioner acted with prior calculation and design began at the jukebox with the victim's request to Ms. Paul to play a record and ended with the shooting.

The eyewitnesses agree that the period between Ms. Paul's approach to the jukebox and the shooting was very brief. The off-duty barmaid, Ms. Youngblood, testified that "it wasn't even a minute" between the petitioner's statement to the victim, "Put your own goddamn dollar in there" and his statement to Ms. Paul, "let's go." (Tr. 447). When the petitioner said that to Ms. Paul, she was still at the jukebox;

she came back to their table and asked to finish her beer. The petitioner said, "Naw .... Let's go," and she grabbed her coat, left her beer, and "went on out the door." (Tr. 448).

Ms. Lymore, the barmaid, testified that after the victim had asked Ms. Paul to play a song, and the petitioner had told him to put his own dollar in the jukebox, the petitioner looked at the victim "for a couple of seconds." (Tr. 508). After "a couple more seconds" Ms. Paul walked back to the petitioner (id.), who said to Ms. Paul "that he don't have time for this 'Kid's shit.['] Let's go." [Tr. 509]. She asked to finish her drink, and "He said, 'No,' and he said, 'Let's go,' and she said, 'Okay. Let's go.'" [Id.].

At that point, Ms. Paul "got up, put her coat on, and headed to the door" with the petitioner and Roseborough "right behind her." But the petitioner "stopped" and said something to the victim, as Roseborough "walked back to the jukebox." [Id.]. The victim "stood up, and he said, 'Don't start no shit, and it won't be no shit,' and [the petitioner] said, 'What did you say, mother fucker,' and shot him." [Id. 509-10].

Ms. Youngblood had also testified that "I don't even think it was maybe about a minute" between the time Roseborough went to the jukebox and the shooting started. (Tr. 478-79). "The whole thing" according to her, "was about the record." (Tr. 483).

The only other estimate of time found in the record was given by Ms. Shepard, the victim's friend. That estimate related, however, to the time she spent in the bathroom, where she had gone after hearing the victim say something to the petitioner. She testified that she spent "maybe two to three minutes" in the bathroom. (Tr. 534). The shooting had not started before she went to the bathroom. She did not hear

any shots while she was in the bathroom. When she came out, the shooting was over and the victim was on the ground.

There is no evidentiary basis for determining rationally when, during the two to three minutes Ms. Shepard was in the bathroom, the shooting occurred. The shots could have been fired immediately after she entered the bathroom or at any time before she came out to find the victim on the ground mortally wounded.

There is no testimonial basis, therefore, for the statement in the Supreme Court's decision that "most of the evidence indicates that the time between the jukebox incident and the shooting was only two or three minutes." *78 Ohio St. 3d at 22.* (Emphasis supplied). All that the evidence shows is that Ms. Shepard estimated that she was in the bathroom for that period of time, during which the jukebox incident unfolded and the fatal shots were fired, leaving the victim where Ms. Shepard found him when she came out of the bathroom. The "two or three minute" estimate does not, accordingly, relate to the duration of the exchange of words about the jukebox and the firing of the shots. That estimate only tells us how long a witness was gone before she saw the victim on the ground. All that the jury would know from this testimony is that the time between the jukebox incident and the shots was not more than two or three minutes; it could not make any finding about whether it had been that long, or how much shorter it might have been.

The other witnesses—Ms. Youngblood and Ms. Lymore—did not give an estimate of the time between the start of the jukebox incident and the shooting. But they testified that "it wasn't even a minute" between the petitioner's statement to the victim, "Put your own goddamn dollar in there" and his statement to Ms. Paul, "let's go." (Tr. 447), and that the petitioner looked at victim "for a couple of seconds" (Tr. 508) after he told him to put his own dollar in

the jukebox, and for "a couple more seconds" as Ms. Paul walked back to the petitioner (id.). At that point, he said, 'Let's go,' to Ms. Paul, who "got up, put her coat on, and headed to the door" with the petitioner and Roseborough "right behind her." But the petitioner "stopped" and said something to the victim, as Roseborough "walked back to the jukebox"; Ms. Youngblood did not "even think it was maybe about a minute" between the time Roseborough went to the jukebox and the shooting started. (Tr. 478-79). Ms. Paul testified that she had been outside "maybe a minute" when she first heard shots. (Tr. 730).

The state courts rejected the petitioner's contention that there was insufficient evidence of prior calculation and design. The Supreme Court's consideration of this issue began with an endorsement of the evidence as summarized by the Court of Appeals:

We find that the evidence presented at appellant's trial sufficiently supports the jury's determination of prior calculation and design. The evidence was conflicting as to the events which took place in the bar prior to the shooting. The observations made by the court of appeals as it reviewed the evidence are a reasonable interpretation of the way the jury may have viewed that evidence. The court of appeals dealt with this issue as follows:

"The evidence reveals Taylor and Alexander did have an exchange of words and intimidating glances prior to the shooting, but the shooting did not occur immediately thereafter. Both men went back to their seats. Taylor ordered his girlfriend to go outside to the car. Meanwhile, his companion, Roseborough, headed for the door but positioned himself near the door behind where Alexander was seated. When Taylor stood up from his chair to leave, Alexander stood up, put his hands up in the air, and the two men

exchanged words again. Taylor immediately pulled out his gun and shot Alexander several times. Alexander fell to the ground and attempted to crawl away, but Taylor walked over to where Alexander had fallen and shot Alexander in the back several times.

"It is reasonable to infer that Taylor ordered his girlfriend to leave and waited for Roseborough to strategically position himself behind Alexander because he planned to shoot Alexander. Moreover, Taylor clearly had a choice not to shoot Alexander after Alexander fell down; Alexander was still alive but injured. Taylor made a conscious decision to walk over to where Alexander was crawling face down on the floor and shot him four more times.

"Construing this evidence in the light most favorable to the prosecution, there was sufficient evidence to prove the element of prior calculation and design. Taylor's conscious decisions to get his girlfriend out of the way, to strategically position Roseborough, and to continue to shoot Alexander after he was down, more than any other evidence proved he acted with prior calculation and design."

78 Ohio St. 3d at 20-21.

Even though the finding that there had been a prior encounter is a finding of fact under *28 U.S.C. § 2254(d)*, other evidence in the record shows that the jury could not rationally have found that that encounter resulted in prior calculation and design. That evidence shows that there was an intervening period, which Ms. Youngblood variously estimated as being at least five minutes to upwards of twenty minutes or more, without any contact, conversation, or confrontation between the petitioner and the victim. Even if there had been an initial incident, in which the victim had flashed a large roll of money and belittled the petitioner, there is no evidentiary basis for believing that that incident,

standing alone, gave rise to any homicidal thoughts on petitioner's part, or otherwise would have led to the shooting. The only rational inference that can be drawn from this evidence is that, if there had been no jukebox incident, there would have been no shooting.

Though there was a period in which the petitioner might have reflected and planned, there is no evidentiary basis for concluding that he did so: the shooting can only be viewed as having been provoked by the later events, which occurred only after Ms. Paul went of her own accord to the jukebox to play a record. There is no reason to believe that she did so—or that the petitioner gave her the dollar to do so—to continue or resume a prior dispute with the victim. And there is no reason to believe that the dispute would have been resumed, or the shooting would have occurred, if the confrontation at the jukebox had not arisen.

Prior calculation, if such existed, therefore, could only have been found to have arisen out of the jukebox incident: i.e., the exchange of words about paying for music. Thus, determination of whether the state presented evidence sufficient to enable a rational jury to find prior calculation and design beyond a reasonable doubt must look solely to what happened after Ms. Paul went to the jukebox, and assess whether those events, and the time in which they occurred, suffice to sustain a finding of prior calculation and design.

The Court of Appeals, and the Supreme Court, when it incorporated the appellate court's summary in its opinion, misread, moreover, the record when it stated that the petitioner "ordered" Ms. Paul to "go outside to the car." There is no evidence of any such order; instead, the evidence from all the witnesses is that the petitioner stated that he wanted to leave, or that they were leaving. No witness testified that the petitioner instructed, much less ordered Ms.

Paul to leave the bar. Thus, the inference that the petitioner did so to get her out of his way as he set about shooting the victim is not sustainable.

Likewise, there is no evidence to support the Court of Appeals assertion that the petitioner "strategically positioned Roseborough" behind the victim as part of a plan to kill him. There is no evidentiary answer to the common sense observation of defense counsel that it would make no sense for Roseborough to get in the likely line of fire. (Tr. 838). The only inference that rationally can be drawn from Roseborough's statement that he wanted to get out of the way (Tr. 669) is that he may have anticipated a fight or something similar between the petitioner and the victim—but not, certainly, that he contemplated that the petitioner would shoot the victim—or, much less, that he was placed in the line of fire by the petitioner as part of a calculated plan to kill the victim.

There is, therefore, no evidence of any "conscious" decisions on the petitioner's part, and any inference that he either ordered Ms. Paul to get out of the way or Roseborough to put himself behind the victim (and in the line of fire) is, absent such evidence, unreasonable. Those putative actions, which the Court of Appeals cited as evidence of prior calculation and design, could not be considered by it, or adopted by the Supreme Court, as manifesting prior calculation and design on the petitioner's part.

The other aspect of the circumstances to which the Court of Appeals looked to support its conclusion about the sufficiency of the evidence of prior calculation and design was the fact that the petitioner "continued to shoot Alexander after he was down." That the petitioner emptied his weapon into the victim's prostrate body is not, however, evidence of prior calculation and design. It is, rather, evidence of petitioner's purpose—to kill the victim:

Neither does the evidence that several gunshots were fired prove that appellant formulated a plan to kill [the victim] during the struggle. Although there was evidence [the victim] was injured and calling for help, this does not warrant an inference that the fight was ended and that defendant formulated a plan to kill [him]. This case is distinguishable from cases where witnesses saw the defendant deliberately pursuing or stopping to shoot an injured person, who was trying to crawl away. There is no evidence of what occurred between the victim and the defendant in between the gun shots. Thus, there is no evidence to indicate that appellant formed a plan to kill between the gun shots.

There is no evidence appellant made a scheme or design to kill [the victim], either during the few minutes between the gunshots, or at any other time. There is no evidence appellant engaged in a studied analysis of the means by which to kill.

The facts here show an instantaneous eruption of events; not prior calculation and design. The defendant did not have more than a few moments to formulate a plan to kill. The fight was one continuous course of events and though there was sufficient evidence to show an intent to kill, there was no evidence that such intent was the result of prior calculation and design. To hold there was prior calculation and design in a case such as this would be to return to the old standard of "deliberate and premeditated malice," which was abolished by the legislature.

State v. Simms,*1996 Ohio App. LEXIS 4087, No. 69314, 1996 WL 532090*, at *3 (Ohio Ct. App. Sept. 19, 1996).

Unquestionably, repeatedly firing into the back of a prostrate victim shows an intent to kill. But intent—acting "purposely"—is not the same as acting with prior calculation and design; each is a separate and distinct element of the

crime of aggravated murder. *State v. Mardis, 134 Ohio App.3d 6, 19, 729 N.E.2d 1272 (1999)* ("'prior calculation and design,' [is] an element entirely independent of and distinct from the less stringent 'purposely,' . . .").

The Ohio Supreme Court noted this distinction in *State v. Jones, 91 Ohio St.3d 335, 345, 2001 Ohio 57, 744 N.E.2d 1163 (2001),* in which it approved jury instructions explaining "how the element of 'prior calculation and design' relates to the element of 'purpose,'" in that "'prior calculation and design' means that 'the purpose to cause the death was reached by a definite process of reasoning in advance of the homicide, which process of reasoning must have included a mental plan involving studied consideration of the method and means with which to cause the death of another." To find prior calculation and design on the basis of the defendant's repeated shooting of the victim conflates the distinct elements of intent and prior calculation and design, and would permit imposition of the death penalty without a showing of an essential element of that offense.

For its part, the Ohio Supreme Court did not rely solely on the summary of the evidence relating to prior calculation and design taken from the Court of Appeals' opinion. The Supreme Court added:

To underscore the observations of the court of appeals, the evidence showed that Sandra Paul had introduced appellant to the victim, Alexander, in the same bar prior to the night of the murder. When Alexander met appellant at that time, Alexander warned Paul not to "be bringing him [appellant] in my bar." Although Paul claimed she told appellant about the warning sometime later, the jury could have inferred from the circumstances that appellant may have learned earlier of Alexander's statement. According to appellant, Alexander had a "nasty attitude" and elbowed him

when they previously met. Clearly, Alexander and appellant had met before, and their relationship was not a cordial one.

On the night of the shooting, their relationship became more strained even before the jukebox incident. Testimony was conflicting as to Alexander's behavior on the night in question. There was some testimony that Alexander acted like a gentleman that night, but some defense witnesses testified to Alexander's boisterousness. Appellant testified he thought Alexander tried to humiliate him by flashing a big roll of money and saying, "If a nig *** ain't got no money, he ain't shit." It was also contended by the defense that Alexander "stared" at Paul and appellant when they were dancing earlier that night. Roseborough claimed that Alexander called appellant a "bitch" and a "punk, hip mother fucker," and invited him several times to fight after the jukebox incident. Alexander also purportedly told appellant, "Mother fucker, these are my friends up here *** [in this bar]. I say and do what I want to do in here." As Paul left the bar, Alexander reportedly told her, "Bitch, I told you not to bring this mother fucker up here to my bar."

The strained relationship between appellant and Alexander occurred because Alexander had previously dated Paul. Furthermore, Alexander had warned Paul not to bring appellant into "his" bar. The night of the shooting, Alexander reportedly was rude and obnoxious, deliberately flashed money in a possible attempt to humiliate appellant, and stared at appellant and Paul as they danced.

Two other specific factors, in addition to the previous relationship of the appellant and the victim, allowed the jury to find that appellant engaged in more than "instantaneous deliberation." Appellant took a gun into a bar where he knew Alexander frequently drank. The jury could reasonably have inferred that appellant may have carried the gun with an intention to use it. The jury could have drawn that inference

from all the circumstances surrounding the shooting even though the prosecution did not specifically claim that appellant went to the bar with the intention of killing Alexander.

Moreover, several of appellant's shots were fired after Alexander, already wounded, was lying on the floor. As Alexander tried to crawl away, appellant walked closer and fired three or four shots into his back. These circumstances also support the jury's finding of prior calculation and design, since they are inconsistent with an "instantaneous eruption of events." *State v. Jenkins, 48 Ohio App.2d at 102, 2 O.O.3d at 75, 355 N.E.2d at 828.*

Even though most of the evidence indicates that the time between the jukebox incident and the shooting was only two or three minutes, there was more than sufficient evidence for the jury to reasonably have found that appellant, with prior calculation and design, decided to shoot Alexander in that space of time. "Neither the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves," but "momentary deliberation" is insufficient. Committee Comment to Am.Sub.H.B. No. 511, R.C. 2903.01. In light of the strained relationship between appellant and the victim, and the other factors mentioned above, two or three minutes is more than instantaneous or momentary under these circumstances, and is more than sufficient for prior calculation and design.

78 Ohio St. 3d at 21-22 (Emphasis supplied).

Much on which the Ohio Supreme Court relied was, however, based on speculation (much of which, in turn, was first advanced by the prosecutor in his closing argument). The Court's statements, when examined in light of the

record, even when viewed, as it must be, most favorably to the State, do not fill in the evidentiary gaps on the issue of prior calculation and design.

The Court's statement that "the jury could have inferred from the circumstances that appellant may have learned earlier of Alexander's statement," while accurate (i.e., the jury could have made such inference), does not make such inference reasonable, or acceptable as proof of prior calculation and design. The only evidence on the issue of when the petitioner learned about the victim's earlier statement was Ms. Paul's testimony that she told the petitioner about that statement only after the shooting and the petitioner's arrest. There is nothing in the record that would justify an inference that the petitioner was aware of that statement before the shooting, much less that such awareness gave rise to prior calculation and design on his part.

The Supreme Court's further observations about "two other specific factors" is likewise speculative and unsupported by the record. The Court stated that the "appellant took a gun into a bar where he knew Alexander frequently drank." At most, the petitioner and the victim had met each other three times. There is nothing in the record to support the Court's contention that the petitioner knew that the victim "frequently drank" at the bar, or, much more importantly, to support the implicit contention that the petitioner anticipated that he and his companions would go to that bar, or that, if they did, they would encounter the victim that evening. The inferential chain is too weak and tenuous to support the Court's conclusion that that circumstance supports a finding of prior calculation and design on the petitioner's part.

The Court also stated that "the jury could reasonably have inferred that appellant may have carried the gun with an intention to use it. The jury could have drawn that inference

from all the circumstances surrounding the shooting even though the prosecution did not specifically claim that appellant went to the bar with the intention of killing Alexander."

Mere possession of a firearm by one who, like the petitioner, routinely carried a gun (Tr. 209) is not, however, evidence of prior calculation and design. *State v. Johnson, 1998 Ohio App. LEXIS 2069,* No. 97*APA03-315,1998 WL 226441*, at *6 (Ohio Ct. App. May 5, 1998) ("That defendant had a gun with him at the Carter residence is not, by itself, evidence of prior calculation and design, given the testimony offered by defendant's girlfriend that he 'sort of frequently carried a weapon."); see also *State v. Williams, 1986 Ohio App. LEXIS 6867, No. 1-85-2, 1986 WL 5907*, at *2 (Ohio Ct. App. May 19, 1986) ("The fact that appellant possessed a gun on the day of the shooting when the witness had never before known the appellant to carry a gun, could have been interpreted by the jury as evidence that appellant had acted purposely with prior calculation and design").

The Supreme Court failed, moreover, to consider what was not in the record that other courts have considered in determining whether a defendant acted with prior calculation and design. The petitioner never uttered an intent to kill; the shooting was not preceded by any threats on his part to do harm to the victim. He did not display or allude to having a firearm. Although there was a break between the initial encounter and the confrontation over the jukebox, nothing in the record suggests that the petitioner contemplated attacking the victim before Ms. Paul went to the jukebox and the victim spoke to her. He, not she or the petitioner initiated the contact at that point. Though the petitioner stood over the victim and shot him as he attempted to crawl away, he had not pursued the victim, or sought him out as he was seeking to escape.

To be sure, the record shows that, the petitioner believed that the victim had a "nasty attitude," the petitioner was dating and the victim had dated the same woman, and they did not care for one another. But this does not show that the petitioner knew prior to going to the bar that the victim considered it to be "his" bar or the victim frequently drank there or that the petitioner had contemplated encountering him, much less doing him harm. Thus, the Supreme Court's inference about the petitioner's intention to use his gun when he entered the bar is without support either in the evidence or inferences that rationally could be drawn from the evidence.

As in *State v. Long, 1997 Ohio App. LEXIS 416, 96APA04-511, 1997 WL 52911,* at *11 (Ohio Ct. App. Feb. 6, 1997), the records contains no evidence to suggest that the petitioner anticipated encountering the victim before entering the bar. The court in that case found no prior calculation and design, even though the defendant interrupted the encounter to retrieve a weapon. As in Long, the evidence in this case "reveals nothing more than a random meeting between appellant and the victim [and] there is no evidence that appellant gave any thought or preparation to the method and/or site of the homicide."

Similarly, as in *State v. Davis, 8 Ohio App.3d 205, 207, 8 Ohio B. 276, 456 N.E.2d 1256 (1982),* in which the court found insufficient evidence of prior calculation and design, the petitioner had not gone "to the bar with the intent of shooting either of" the victims:

Rather, defendant went to the bar "to have a good time" but was refused admittance. After defendant demanded entrance, verbal threats grew into a physical confrontation between defendant and the three persons within the bar. Defendant did not reach for his gun in his pocket until he was outnumbered and getting the worse of their treatment. No evidence was presented which demonstrated a previous strained

relationship between defendant and the doorman or the bar owner. The mere fact that defendant was carrying a gun on this occasion but was not carrying a gun on some earlier visit to a different bar is not sufficient to demonstrate a prior calculation and design to kill someone at this bar.

The shooting occurred during an almost "instantaneous eruption of events."

The circumstances here are similar to those in *State v. Richardson, 103 Ohio App.3d 21, 25, 658 N.E.2d 321 (1995)*, in which the defendant, who had been involved in a fight and been beaten, ran to a nearby building, retrieved a gun, shot the victim, and ran away. The court held that the "events were not drawn out but occurred within seconds" and involved "'almost instantaneous eruption of events,'" rather than a "'scheme designed to implement the calculated decision to kill.'" To "hold that the conduct here constitutes 'prior calculation and design,'" the court stated, would cause those words "to lose their meaning" and cause "the legislative distinction between murder and aggravated murder [to] disappear." The General Assembly, as is clear from the legislative history to *§ 2903.01(A)*, "intended to impose a harsher penalty upon those who commit murder after reflection, deliberation, or as a result of a scheme or plan." Though "the reflection need not be long, nor the plan elaborate, but it must exist." Id.; see also *Davis, 8 Ohio App.3d at 207* (defendant, who "went to the bar 'to have a good time,'" killed victim and shot another individual after being denied admittance to a bar, and was getting the worse of an ensuing fight).

The record in this case shows an almost "instantaneous eruption of events," and that is all that a rational jury could find on the basis of the record, even when viewed most favorably to the State. Even if there were an initial encounter and exchange of hostile words between the petitioner and his

victim—though none of the State's witnesses testified about any such encounter—that incident cannot be viewed as generating a decision on the petitioner's part to shoot and kill the victim. At least five, and perhaps as many as twenty or more minutes (according to Ms. Youngblood) elapsed between any such initial encounter and Ms. Paul's going to the jukebox.

After she did so, the events leading to the victim's death unfold rapidly. The evidence of how they unfolded does not suffice to enable a rational jury to find beyond a reasonable doubt that the petitioner acted with the "studied care in planning" required by *§ 2903.01(A)* of the Revised Code. *State v. Jones, 91 Ohio St.3d at 345* ("'prior calculation and design' means that 'the purpose to cause the death was reached by a definite process of reasoning in advance of the homicide, which process of reasoning must have included a mental plan involving studied consideration of the method and means with which to cause the death of another"; see also Commentary to O.R.C. *§ 2903.01(A)*.

By misreading the record to find that "most of the evidence indicates that the time between the jukebox incident and the shooting was only two or three minutes," *78 Ohio St. 3d at 22*, when, in fact, none of the evidence could sustain a finding that the fatal encounter lasted that long, the Ohio Supreme Court disregarded its own admonition in *State v. Cotton, 56 Ohio St.2d 8, 11, 381 N.E.2d 190 (1978)* that *§ 2903.01(A)* "requires more than the few moments of deliberation permitted in common law interpretations of the former murder statute, and to require a scheme designed to implement the calculated decision to kill."

The Supreme Court, moreover, misread its prior precedents when it stated:

The situation in this case resembles previous cases in which this court upheld jury findings of prior calculation and design. See, e.g., *State v. Claytor; [61 Ohio St.3d 234, 574 N.E.2d 472 (1991)]*, *State v. Robbins; [58 Ohio St.2d 74, 12 Ohio Op. 3d 84, 388 N.E.2d 755 (1979)] State v. Toth, [52 Ohio St.2d 206, 371 N.E.2d 831 (1977)]*. In particular, Toth involved a defendant who apparently was unacquainted with the victim until the evening of the killing, and a murder which occurred after brief encounters in several bars. The facts in Toth are similar to those in this case, and Toth did not involve any more evidence of studied deliberation than was present here. This court upheld the jury finding of prior calculation and design and remarked that "the appellant's method of shooting *** as well as his apparent determination to follow through on a specific course of action, sufficiently supports the finding that the appellant had adopted a plan to kill." *Toth, 52 Ohio St.2d at 213, 6 O.O.3d at 465, 371 N.E.2d at 836.*

78 Ohio St. 3d at 22.

In Claytor the defendant had been told by a companion not to take a gun with him when he and the companion went into a Veteran's Administration Hospital. Once in the hospital, the companion told a security officer that the defendant was trouble, and asked for help. After going outside, the defendant and his companion were approached by two security officers, who asked for identification. The defendant gave one of the guards a bank book and a Social Security card. When asked for identification with a picture, the defendant "fumbled through his clothes, then said: 'I will show you something that you don't want to see.'" Drawing a pistol, the defendant twice shot and mortally wounded one of the guards as he sought to back away from the defendant. The defendant then shot the other guard, who, though wounded, tried to flee. The defendant followed him, and after

hesitating to clear his gun, which had become jammed, shot him fatally. *State v. Claytor, 61 Ohio St.3d 234, 235, 574 N.E.2d 472 (1991).*

In Robbins:

The appellant accosted the decedent in the hallway of their apartment building and struck the decedent, knocking him to the floor. Further, the state's evidence was that the appellant went into his adjacent apartment and got a long knife, or "sword," from under his mattress, returned to the hallway and stabbed the victim to death. The victim tested .42 percent blood alcohol content, which, according to the medical examiner, would probably result in a condition where the victim could not have been a real threat to anyone and that his stupor would have been obvious. The appellant and Hastine Clark, who testified for the prosecution, moved the victim's body to another apartment and attempted to clean the hallway.

The actions of appellant as adduced by the state's evidence established that appellant used extreme aggression against a helpless victim, then leaving the victim in the hallway and returning to his apartment to secure the weapon which he used to stab the victim to death instants later.

State v. Robbins, 58 Ohio St.2d 74, 78-79, 388 N.E.2d 755 (1979).

In Toth, which the Supreme Court described as not involving "any more evidence of studied deliberation than was present here," *78 Ohio St. 3d at 18*, three young women had gone to a bar around 10:00 p.m.

Upon entering the bar, Patricia left the group to go to the restroom, and upon rejoining her friends, saw the

appellant sitting at the bar next to Terri. The girls left the bar around 10:30 p. m. because the appellant was bothering Terri.

The girls then set out by car to the Rock Palace, located about one mile away from the Toy Box Bar, only to again encounter the appellant. While Kathy and Patricia were standing near the juke box, the defendant was seen approaching Terri, who continued to ignore him. The girls thereupon left the Rock Palace and returned to the Toy Box Bar. They arrived there around 1:00 a. m. on the morning of June 5, 1975.

Meanwhile, shortly before 1:00 a. m. that same morning, Orin G. Noyes saw the appellant trying to repair his car on the corner of the parking lot next to the Rock Palace and the main road. Noyes, in assisting the appellant, found that the car's headlights were connected to the wrong terminals, and repaired them. Noyes heard the appellant say that he would "waste" those responsible for "messing" with his headlights.

The appellant then returned to the Toy Box Bar and began to argue with the three girls concerning his headlights. Patricia denied that the girls did anything to his car, and asked that the appellant leave them alone.

Shortly thereafter, the appellant reached into his pants and pulled out a gun. The gun fell to the floor. The appellant picked up the gun, fired and missed. He then grabbed Patricia by the hair, held the gun to her jaw, and fired. Taking two more steps he shot Terri, and from two to four more steps shot Kathy.

State v. Toth, 52 Ohio St.2d 206, 207, 371 N.E.2d 831 (1977).

Contrary to the Supreme Court's assertion on direct review of petitioner's conviction, each of the three cases which it described as similar to the petitioner's case with regard to the evidence of prior calculation and design is not at all similar. Each involved substantially more aggressive behavior: in *Claytor,* the defendant, after stating that he would show the victims something they would not like, shot one victim, shot and pursued a second victim, and shot the second victim again after pausing to unjam his gun. In *Robbins* the defendant used "extreme aggression against a helpless victim, then [left] the victim in the hallway and returned to his apartment to secure the weapon which he used to stab the victim to death instants later."

In *Toth,* the facts of which, according to the Ohio Supreme Court on direct review of petitioner's conviction, were similar to those in this case, and "did not involve any more evidence of studied deliberation than was present" in this case, *78 Ohio St. 3d at 22*, the defendant sought out his three victims over a period of three hours, stated he was going to "waste" them (believing them to have tampered with his car), and shot them seriatim.

The rapid sequence of events in this case neither involved aggressive or threatening statements, pursuit, retrieval of a weapon, or multiple victims. There is, moreover, no basis for the Supreme Court's contention that the scenario in Toth, which lasted several hours, repeated and unfriendly encounters between the defendant and his victims, and included his threat to "waste" the victims, "did not involve any more evidence of studied deliberation than was present here." The cases cited by the Ohio Supreme Court as supportive of its affirmance of the petitioner's conviction, on examination, support, as do other Ohio Supreme Court decisions on prior calculation and design, my conclusion that no rational trier of fact could find that the State proved prior calculation and design beyond a reasonable doubt.

I conclude, accordingly, that the petitioner is entitled to relief on his claim that the evidence was insufficient to enable a rational trier of fact to find him guilty beyond a reasonable doubt of aggravated murder.

6. Absence During Critical Phase of Trial

During petitioner's trial, there were four instances in which the petitioner and or counsel were not present. First, petitioner was not present when the trial court excused several members of the venire. Petitioner also objects to two instances in which the trial court addressed the jury after deliberations began at both phases. Finally, the prosecution appeared before another judge of the Ohio Common Pleas Court to obtain a nunc pro tunc corrected entry of petitioner's prior murder conviction without petitioner's or defense counsel's knowledge. Petitioner claims that, because he was not present during these occurrences, he was denied the right to due process and a fair trial.

Petitioner raised these claims to the Ohio Supreme Court, preserving them for merit review.

A criminal defendant has the right to be present at any proceeding whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge . . . . The presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.

United States v. Gagnon, 470 U.S. 522, 526, 84 L. Ed. 2d 486, 105 S. Ct. 1482 (1985) (quoting *Snyder v. Massachusetts, 291 U.S. 97, 105-06, 78 L. Ed. 674, 54 S. Ct. 330 (1934))* (internal quotation marks omitted). If a federal habeas court determines that error occurred and the defendant was excluded from a critical phase of the trial, the court must

then determine whether such error was harmless or prejudicial to the defendant. *Rushen v. Spain, 464 U.S. 114, 119-20, 78 L. Ed. 2d 267, 104 S. Ct. 453 (1983).*

a. Excusing Jurors

After gathering the venire, the trial court, in camera, excluded several venire members from the panel because of time conflicts or medical hardships that would occur if chosen to serve on the jury. Tr. 4-6. Defense counsel were present at the time and waived petitioner's right to be present.

On appeal, the Ohio Supreme Court determined that Taylor's absence from this hearing was not critical to his receiving a fair and just trial. It concluded: "The proceeding was not a 'hearing' at which the judge received evidence. It was no more than the routine noting of excuses from jury duty." *State v. Taylor, 78 Ohio St.3d at 25.* This holding complies with the *Gagnon* Court's determination that a criminal defendant's right to be present during a proceeding extends only to instances that would affect his or her ability to defend against the crime charged.

b. Guilt Phase Deliberation Questions

During the guilt-phase deliberations, the jury sent a question to the trial judge asking whether murder was an aggravated felony. The trial court incorrectly responded yes. It is unclear from the record whether the trial court consulted with counsel before responding to the jury or if counsel objected to petitioner's absence during the trial court's response.

At the outset it is necessary to note that "the mere occurrence of an ex parte conversation between a trial judge and a juror does not constitute a deprivation of any

constitutional right." *Gagnon, 470 U.S. at 526* (quoting *Rushen v. Spain, 464 U.S. 114, 125-26, 78 L. Ed. 2d 267, 104 S. Ct. 453 (1983))* (internal quotation marks omitted). On appeal, the Ohio Supreme Court determined that any error occurring from this communication was harmless. *Taylor, 78 Ohio St.3d at 26.*

As stated above, the United States Supreme Court in *Brecht v. Abrahamson, 507 U.S. 619, 637, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993)*, held that the test for harmless error is whether the error had a "substantial and injurious effect" on the jury's verdict. Thus, a petitioner must establish that the error resulted in "actual prejudice." *Brecht, 507 U.S. at 637* (citing *United States v. Lane, 474 U.S. 438, 449, 88 L. Ed. 2d 814, 106 S. Ct. 725 (1986))*; see also *Chapman v. California, 386 U.S. 18, 22, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967)* ("We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.").

Petitioner fails to demonstrate why the Ohio Supreme Court's harmless error analysis was an unreasonable application of United States Supreme Court precedent. As *Brecht* states, a petitioner must state that some actual harm occurred from the ex parte contact. In this case, petitioner relies merely on conjecture.

c. Penalty Phase Deliberation Questions

As the jurors deliberated after the mitigation phase of trial, they asked the trial court to define duress, coercion, and strong provocation, and whether it would be possible to take this definition with them to the hotel at which they were sequestered. The trial court discussed these questions with counsel, who helped formulate a response to the first

question. Defense counsel did not object to the trial court's responses and waived defendant's presence during the in camera conversation in which the trial court explained the answers it provided to the jury. Tr. 983-84.

Although petitioner properly raised this issue to the Ohio Supreme Court, it did not specifically address it in its opinion. Any error that occurred during this conversation, however, was harmless. The trial court merely provided the jury with the definition of duress, coercion, and strong provocation that defense counsel previously had helped to create. Moreover, the petitioner's presence during this meeting would have contributed nothing to it. *Gagnon, 470 U.S. at 527.* Thus, any error that occurred from the trial court's contact with the jury in this instance was harmless.

d. Nunc Pro Tunc Entry

During trial, the prosecutor appeared before another judge of the Common Pleas Court to obtain a nunc pro tunc corrected entry of Taylor's 1974 murder conviction. The prosecution obtained this entry without notice to either petitioner or his counsel. Defense counsel objected to this entry being admitted into evidence, but the trial court overruled the objection. Tr. 650-56.

On direct appeal, the Ohio Supreme Court cogently analyzed this claim:

In proposition of law III, appellant argues that the trial court erred by issuing the April 23, 1993 nunc pro tunc entry as to the 1974 conviction without giving appellant or his counsel notice of the proposed change or an opportunity to be heard. The judge who signed the nunc pro tunc entry, Judge Norman A. Fuerst, was not the judge who presided over appellant's 1993 murder trial. At trial in the instant case, the prosecutor did not explain why he secured that April 23,

1993 nunc pro tunc entry after trial testimony had begun on April 22, 1993. The prosecutor also did not explain why no notice was given to opposing counsel regarding the intent to secure the entry. When the prosecutor offered the entry into evidence, appellant's counsel objected.

The state argues that appellant was not wrongfully excluded from a crucial hearing because no hearing was held prior to Judge Fuerst's decision to issue the nunc pro tunc entry. However, since the 1993 trial had already started, the prosecutor arguably should have given prior notice to opposing counsel before securing the 1993 entry correcting the 1974 judgment entry.

Nevertheless, the prosecutor did not per se violate appellant's right to be present at the proceedings to correct the 1974 journal entry . . . . Judge Fuerst's decision to sign that entry relating to the 1974 conviction was not a critical stage of appellant's 1993 trial, provided appellant had an opportunity to contest the accuracy of the corrected entry during the course of the 1993 trial. The relevant crucial stage of appellant's 1993 trial occurred when the prosecution offered the nunc pro tunc entry into evidence at the 1993 trial. Appellant was present at that point in his trial, appellant and his counsel had notice and an opportunity to challenge the corrected entry's admission into evidence, as they did so, albeit unsuccessfully . . . . Nor can appellant contest the accuracy of the nunc pro tunc entry; he admitted his 1974 conviction was for two counts of murder. In these circumstances, any irregularities concerning the nunc pro tunc entry did not affect appellant's fundamental rights.

78 Ohio St.3d at 23-24. The Ohio Supreme Court's finding that the critical phase of the 1993 trial was when the prosecution sought admission of the corrected entry was not an unreasonable application of Gagnon because it was only at

that point that the corrected entry had an impact on the crime for which he was being tried. His presence at that point renders this claim meritless.

7. Improper Admission of Nunc Pro Tunc Entry

Petitioner objects to the trial court's admission of the nunc pro tunc journal entry of his 1974 murder conviction. This claim is procedurally defaulted because the petitioner did not raise this claim as an admission of evidence claim at any juncture of his state-court appeals. "The doctrine of exhaustion requires that a claim be presented to the state courts under the same theory in which it is later presented in federal court." *Wong v. Money, 142 F.3d 313, 322 (6th Cir. 1998).*

This claim lacks merit in any event. Alleged errors in the admission of evidence, standing alone, are not enough to entitle a petitioner to relief under *§ 2254*. As one court stated, "errors by a state court in the admission of evidence generally are not reviewable by a habeas court 'unless they so perniciously affect the prosecution of a criminal case as to deny the defendant the fundamental right to a fair trial." *Skaggs v. Parker, 27 F. Supp.2d 952, 985 (W.D. Ky. 1998)*, rev'd on other grounds, *230 F.3d 876 (2000)* (quoting *Kelly v. Withrow, 25 F.3d 363, 370 (6th Cir. 1994)).* "To determine whether the admission of certain evidence violated the defendant's constitutional right to a fair trial, the habeas court must first determine whether the evidence is relevant or probative to an issue on which the prosecution bears the burden of proof." Id. (citing *Estelle v. McGuire, 502 U.S. 62, 69-70, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991)).* If the court concludes that the evidence was relevant to an essential element of the state's case, its inquiry is over; by definition, there has been no due process violation. Id.

In this case, the evidence of petitioner's 1974 murder conviction was relevant to the prior murder specification found in O.R.C. *§ 2929.04(A) (5)*. More importantly, there is no dispute that petitioner was convicted of murder in 1974. Although Ohio Governor Rhodes mistakenly referred to petitioner's conviction as "attempted murder" when he commuted petitioner's sentence in 1982, *Taylor, 78 Ohio St.3d at 24*, petitioner does not now allege that he was not, in fact, convicted of murder. The trial court's admission of the nunc pro tunc entry did not deny petitioner a fair trial.

8. Unconstitutionality of the Death Penalty

In this claim, the petitioner asserts that Ohio's capital punishment scheme is unconstitutional on its face. None of petitioners allegations are meritorious. In summary fashion, petitioner's allegations are listed, in italics, and thereafter are the reasons they are unpersuasive.

. *Ohio's scheme is unconstitutionally arbitrary because it allows for prosecutorial discretion to determine whether to seek a capital indictment.* The Supreme Court in *Gregg v. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976)*, rejected this argument under a similar death penalty statute, condoning the discretionary system.

. *Ohio's scheme is unconstitutional because it imposes the death penalty in a racially discriminatory manner.* According to *McCleskey v. Kemp, 481 U.S. 279, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987)*, a capital defendant cannot evade a death sentence merely by demonstrating the statistical disparity of capital defendants of a particular race. Instead, a capital defendant must prove that the decisionmaker in his or her individual case acted with a discriminatory purpose, and that such actions had a discriminatory effect on the proceeding. *Id. at 292*. Petitioner has made no such showing in his case.

. *The Ohio scheme is unconstitutional because it is underfunded.* Other than bare assertion, petitioner neither demonstrates that Ohio insufficiently funds its capital cases nor explains how this alleged lack of funds is a constitutional violation.

. *The Ohio scheme is unconstitutional because it denies the capital defendant a fair and adequate appellate review.* Once again, beyond petitioner's assertion, he neither provides evidence of this allegation nor alleges a specific constitutional violation.

. *Ohio's scheme is unconstitutional because it requires the jury to find an aggravating factor during the guilt phase of trial.* The Supreme Court has articulated clearly the constitutional mandates for imposing the death penalty. In *Lockett v. Ohio, 438 U.S. 586, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978)*, the Court held that any death penalty statute must allow the sentencer to review all mitigating evidence during the penalty phase, thereby fashioning a sentence befitting the individual defendant. Because death "is so profoundly different from all other penalties," the Court reasoned, it cannot be imposed without individualizing the sentence. *Id. at 605*. The Court further refined the statutory limiting requirement in *Zant v. Stephens, 462 U.S. 862, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983)*. In that case, the Court concluded that any death penalty statute must narrow the class of death-eligible defendants from those not death eligible. *Id. at 177*. Specifically, a state may choose either to legislatively limit the definition of death-eligible crimes, or it may broadly define capital offenses but narrow the defendants who actually receive a death sentence by using aggravating circumstances during the penalty phase. *Lowenfield v. Phelps, 484 U.S. 231, 246, 98 L. Ed. 2d 568, 108 S. Ct. 546 (1987)*.

Ohio's death penalty scheme complies with these mandates. First, *§§ 2929.04(B) and (C)* allow the defendant to present, and the fact finder to consider, all statutorily enumerated mitigating factors. Moreover, *§ 2929.04(B) (7)* permits a fact finder to consider all mitigating factors in addition to those enumerated in the statute. Finally, the Ohio death penalty scheme satisfies the Zant requirements by demanding the fact finder to find the existence of at least one aggravating circumstance set forth in *§ 2929.04(A).*

. *Ohio's scheme is unconstitutional because it imposes a risk of death on those capital defendants who choose to exercise their right to trial.* In *United States v. Jackson, 390 U.S. 570, 582, 20 L. Ed. 2d 138, 88 S. Ct. 1209 (1968),* the Supreme Court determined that a legislative body cannot produce a chilling effect on a defendant's *Fifth Amendment* right not to plead guilty and *Sixth Amendment* right to demand a jury trial. In that case, the Court struck down the capital portions of a federal kidnapping statute because it authorized only the jury to impose the death sentence. Conversely, in Ohio "a sentence of death is possible whether a defendant pleads to the offense or is found guilty after a trial." *State v. Buell, 22 Ohio St.3d 124, 138, 22 Ohio B. 203, 489 N.E.2d 795 (1986).* Consequently, the Ohio scheme comports with constitutional mandates.

. *Ohio's scheme is unconstitutional because it requires that the pre-sentence report be submitted to the jury once the defendant requests it.* The respondent alleges this claim is procedurally defaulted because petitioner did not raise it in state court.

This claim lacks merit in any event. Although the *Fifth Amendment* would be violated if a court orders a defendant to undergo a psychiatric examination without informing the defendant that his statements can be used against him, and then admits his statements into evidence during the

sentencing phase in order to prove statutory aggravating circumstances, see *Estelle v. Smith, 451 U.S. 454, 68 L. Ed. 2d 359, 101 S. Ct. 1866 (1981)*, the *Fifth Amendment* will not be violated if the defendant requests the psychiatric evaluation himself. This reasoning is explained in *Buchanan v. Kentucky, 483 U.S. 402, 97 L. Ed. 2d 336, 107 S. Ct. 2906 (1987)*:

A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. This statement leads logically to another proposition: if a defendant requests such an evaluation or presents psychiatric evidence of such an evaluation, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no *Fifth Amendment* privilege against the introduction of this psychiatric testimony by the prosecution. Id. (citations omitted).

. *Ohio's scheme provides an inadequate proportionality review.* Proportionality review is not constitutionally required. *Pulley v. Harris, 465 U.S. 37, 50-51, 79 L. Ed. 2d 29, 104 S. Ct. 871 (1984).* See also *McQueen v. Scroggy, 99 F.3d 1302, 1333-34 (6th Cir. 1996)* ("There is no federal constitutional requirement that a state appellate court conduct a comparative proportionality review."). By statute, however, Ohio requires the appellate courts to engage in a proportionality review. *Ohio Rev. Code § 2929.05(A).*

Because Ohio law requires appellate courts to engage in proportionality review, the review must be consistent with constitutional requirements. *Kordenbrock v. Scroggy, 680 F. Supp. 867, 899 (E.D. Ky. 1988)* (citing *Evitts v. Lucey, 469 U.S. 387, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985)).*

Nonetheless, when the state courts have engaged in a proportionality review, the district court's review is limited. The district court is to examine the state's proportionality review only to determine whether the imposition of death on the petitioner is patently unjust or "shocks the conscience; the court is not to second-guess the state court's comparison of other cases in which the death penalty was imposed." Id. (citing *Moore v. Balkcom, 716 F.2d 1511, 1517 (11th Cir. 1983)).* See also *Spinkellink v. Wainwright, 578 F.2d 582, 604 (5th Cir. 1978)* (same). Moreover, the Sixth Circuit in a recent opinion stated that because "proportionality review is not required by the Constitution, states have great latitude in defining the pool of cases used for comparison." *Buell v. Mitchell, 274 F.3d 337, 369 (6th Cir. 2001).*

. *Ohio's scheme is unconstitutional because the jury is not permitted to consider the appropriateness of the sentence.* No such constitutional mandate exists. Moreover, the Ohio scheme provides for an appropriateness review on direct appeal.

9. Cumulative Error

Petitioner alleges that the cumulative errors that occurred during his trial and appeal warrant habeas relief. Respondent alleges this claim is procedurally defaulted because petitioner did not raise this claim under the same theory at any point in state court.

This claim would be without merit in any event. Accumulated errors are not tantamount to reversible error "if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict." *Satterwhite v. Texas, 486 U.S. 249, 256, 100 L. Ed. 2d 284, 108 S. Ct. 1792 (1988).* If error occurred, but without constitutional significance, then the error is deemed harmless and the verdict sound. Id. Petitioner's cumulative error claim

lacks merit because, for the reasons set forth elsewhere in this Opinion, his individual claims (except his claim of insufficient evidence) lack merit.

Conclusion

In light of the foregoing review and consideration of each of the petitioner's claims, including his defaulted claims, on its merits, it is

ORDERED THAT the petition for a writ of habeas corpus be, and the same hereby is granted.

So ordered.

S/ James G. Carr

3/3/03 United States District Judge

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No. 03-151

In The Supreme Court Of The United States

BETTY MITCHELL, Warden, *Petitioner,*

v.

WILEY DAVIS, JR., *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S MOTION
TO PROCEED IN FORMA PAUPERIS

Respondent Wiley Davis, Jr., respectfully requests leave to proceed *in forma pauperis.* Respondent was declared indigent by the United States District Court for the Northern District of Ohio and the Sixth Circuit. Under 18 U.S.C. §3006A and 21 U.S.C. §848, the District Court and the Sixth Circuit appointed undersigned counsel to represent Respondent.

Respectfully Submitted,

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ON PETITION FOR WRIT OF CERTIORARI TO
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RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Should this Court grant certiorari to review the Court of Appeals' application of Boyde v. California, 494 U.S. 370 (1990), to the unique instructions and verdict forms given to Respondent's jury in determining whether the instructions and verdict forms violated this Court's established Mills v. Maryland, 486 U.S. 367 (1988) decision which issued four years before Respondent's trial?

2. Should this Court should grant certiorari where the questions presented relate neither to the legal basis of the opinion below nor to any issue raised by Respondent?

3. Should this Court grant a petition for writ of certiorari relying on, at best, an intra-circuit conflict that relates to a determination of the unique aspects of the jury instructions and verdict forms as given to Respondent's jury?

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No. 03-151

In The Supreme Court Of The United States

BETTY MITCHELL, Warden, *Petitioner,*

v.

WILEY DAVIS, JR., *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Wiley Davis, Jr., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the United States Court of Appeals for the Sixth Circuit's opinion in this case. The Sixth Circuit's opinion is reported as Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003). The Sixth Circuit denied *en banc* review finding that rehearing was unwarranted. Indeed, no judge of the *en banc* court found Petitioner's *en banc* petition worthy of a vote. Davis v. Mitchell, 2003 U.S. App. LEXIS 8417 (6th Cir. 2003), Apx. 31a-32a (noting "no judge of this court having requested a vote on the suggestion for rehearing en banc . . . .").[1]

STATEMENT OF THE CASE

Petitioner showed an unusual callousness as to the true basis of the charges and convictions Respondent has faced. Petitioner incorrectly alleges in the very first line of

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[1] Due to it's ruling, the Sixth Circuit pretermitted the consideration of three other issues upon which a certificate of appealability was granted. Apx. 17a.

her statement of the case that Respondent "brutally raped" Amy Perkins. Petition p. 7. This is simple wrong. In truth, while Respondent was initially charged with rape (the fifth count of a six count indictment), the State of Ohio dismissed the rape count prior to Respondent's trial. Return of Writ Apx. p. 748.

While the jury did find Respondent guilty of an attempted rape death penalty specification, notably absent from and contrary to Petitioner's Statement of the Case, the Ohio Supreme Court *reversed* the conviction for the attempted rape specification because the attempted rape was not supported by sufficient evidence. State v. Davis, 76 Ohio St.3d 107 (1996), Apx. 83a ("Based on the evidence presented, we find there was insufficient evidence to prove beyond a reasonable doubt that Davis attempted to rape Perkins."). Therefore, it is simply a gross mischaracterization of the record to assert Respondent "brutally raped".

Further, Petitioner's statement of the case creates confusion as to when the constitutionally deficient instructions and verdict forms were given to Respondent's jury and also incorrectly describes Ohio death penalty procedures. Petitioner partially provides the instructions found by the Court of Appeals to be unconstitutional. Petition pp. 7-8. Thereafter, Petitioner notes "[a]fter deliberating, the jury convicted Davis of all counts listed in the indictment and recommended death sentences for the two aggravated murder counts." Petition pp. 8-9. This incorrectly describes the chronology of Respondent's case as well as Ohio death penalty procedures.

First, the jury had already convicted Respondent of some of the crimes charged and the death penalty specifications *prior to* hearing the flawed instructions and receiving

the flawed verdict forms. Contrary to Petitioner's statement, the determination of sentence was subsequent to, not at the same time, as a determination of guilt.

Second, Ohio provides a bifurcated system. An initial culpability phase occurs, which may or may not lead to a subsequent penalty phase. The jury determines guilt of the underlying crimes as well as the specifications at the culpability phase. The jury's finding as to guilt of the specifications serves two purposes in Ohio, as described by the Ohio Supreme Court, it provides the required narrowing function under Furman and its progeny, and determines death eligibility. State v. Henderson, 39 Ohio St.3d 24 (1988) (guilt finding as to specs performs the narrowing/eligibility function).

If a jury finds a defendant guilty of aggravated murder and a death specification, only thereafter does a defendant become death eligible. At which point, the penalty phase commences. An Ohio jury must decide and answer two questions at the penalty phase. First, the individual jurors must determine whether any mitigating factors exist. Second, the jury weighs the aggravating circumstances against the mitigation, and then determines which sentence to recommend. Both of these decisions were constitutionally corrupted by the unique instructions and verdict forms given to Respondent's jury.

Simply, the Sixth Circuit considered the unique instructions and verdict forms given to Respondent's jury. In so doing, the court identified the correct standard from this Court. Davis, 318 F.3d at 688, Apx. 12a, citing Jones v. United States, 527 U.S. 373 (1999) and Boyde v. California, 494 U.S. 370 (1990) ("whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the constitution").

The court acknowledged the unique instructions and verdict forms under consideration. Respondent's jury had just been instructed as to the two decisions they were required to make: the preliminary question as to existence of mitigation and the ultimate decision as to the weighing of aggravation versus mitigation. Immediately, thereafter the jury was instructed "since this is a criminal case the law requires that in order for you to reach a decision all 12 of you must be in agreement." Davis, at 689-90, Apx. 14a. This significant language, as well as the requirement of twelve signatures signifying acquittal of death before a life verdict could even be considered (Id.), which lead the court to conclude "the inescapable likelihood in this case is that the jury under stood the instructions to require unanimity in both its ultimate and interim conclusions violates Mills." Davis, at 90, Apx. 15a . The court thus granted relief on the ground that Respondent was denied his rights at the penalty phase of the trial, as guaranteed by Mills v. Maryland, 486 U.S. 367 (1988) and McCoy v. North Carolina, 494 U.S. 433 (1990).

Petitioner wholly mischaracterizes the basis of the court's opinion. Petitioner contends that the court granted relief solely on the basis that Respondent's jury was not instructed as to what occurs if they are deadlocked. Petitioner contends this creates conflict with Jones, 527 U.S. 373,[2] and a host of Circuit authority that has applied Jones. Like Petitioner's misleading assertions as to the "brutal rape," this is yet again a clear misstatement of the ruling of the court of appeals.

Indeed, the Panel did not find constitutional error due to a failure to instruct as to the consequences for a potential failure to agree. The Panel applied Boyde and found error because the instructions and verdict forms violated Mills by requiring juror

[2] In Jones, this Court rejected the proposition that jurors must be instructed as to the consequences of their failure to agree.

unanimity as to the existence of mitigation and requiring an "acquittal first" or other before the jury could give effect to mitigating evidence and consider a life sentence. Davis, 318 F.3d at 689-71, App. 14a-17a. Petitioner attempts to manufacture a Jones conflict, however, the opinion rebuts any such suggestion:

> Given the requirement of unanimity as to the jury's ultimate recommendation of either death or life under Ohio law, it is not surprising that the unarticulated but constitutionally required non-unanimous mechanism that will prevent a recommendation of death is obscured to such an extent that it cannot even be said to be implied by the instructions in this case. Instead of instructing the jury that it need not be unanimous in rejecting the death penalty, the trial judge in this case told the jury that in order to return a verdict for life imprisonment, "you must find that the State has failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant was found guilty of committing outweigh the mitigating factors." Immediately thereafter, the Court instructed that "since this is a criminal case the law requires that in order for you to reach a decision all 12 of you must be in agreement." The verdict form likewise reflected a unanimity requirement in finding that the aggravating circumstances do not out weigh the mitigating circumstances....

Davis, at 689, App. 14a. The court did not fault the trial court for failing to instruct on what occurs upon jury deadlock, but faulted the state court for "obscuring" the juror's ability to consider and give effect to mitigation without the unanimous approval of all jurors. Id. Thus, the court concluded Respondent's acquittal first instructions present "an entirely different instruction from one that clearly informs the jurors that a life verdict can be rendered by a jury that has not first unanimously rejected the death penalty." Id.

The court's decision does not implicate Jones. Rather, it reinforces what this Court has consistently maintained: life should be on equal footing with death via the unfettered ability to consider and give effect to mitigation by each juror.

ARGUMENTS AS TO WHY CERTIORARI SHOULD BE DENIED

I. THE QUESTIONS PRESENTED CONTAIN MISSTATEMENTS AND MISCHARACTERIZATIONS OF THE RECORD

As an initial matter, the questions presented by Petitioner are misleading and contain critical mischaracterizations of the legal issues considered by the Sixth Circuit. The three questions presented by Petitioner concern whether the Sixth Circuit failed to follow the clearly established authority of this Court in that the Sixth Circuit found error due to the failure to instruct the jury that they need not be unanimous. Petition, unnumbered.

This simply is not true. First, Respondent never alleged below that the failure to give instructions engendered constitutional error. Rather, Respondent argued that the instructions and verdict forms unique to his case violated Mills. The fact Respondent never argued the absence of instructions constituted error is borne out by Petitioner's Final Brief below, where Jones v. United States is not even cited.

Second and presumably because Respondent never raised such challenges, the Sixth Circuit did not decide the questions now presented by Petitioner. Rather, the Sixth Circuit found that a reasonable jury could have understood the instructions in Respondent's case as requiring unanimity as to the existence of mitigation and denied a jury the opportunity to give effect to the mitigation until unanimously rejecting death. Davis, 318 F.3d at 689-92, App. 14a-17a. Thus violating Mills. Id.

The Sixth Circuit's opinion merely applied this Court's authority to the series of verdict forms and jury instructions given to Respondent's jury. In so doing, the Sixth Circuit identified and applied the required and correct Supreme Court test from Boyde, 494 U.S. 370. See Davis, 318 F.3d at 688, App. 12a ("whether there is a reasonable

likelihood that the jury has applied the challenged instruction in a way that violates the constitution") (citations omitted). Applying Boyde, the Panel concluded Respondent's jury received an improper "acquittal first" instruction and verdict forms, and the instructions required unanimity as to the existence of mitigating evidence before it could be weighed. Id. at 689-92, Apx. 14a-17a. Thus the Panel ruled these two instructional errors violated the Eighth Amendment as interpreted by this Court in Mills by requiring unanimity as to the preliminary question (existence of mitigation) and as to the ultimate sentencing question (no life option until all jurors acquit of death). Id.

In this regard, Petitioner attempts to manufacture her questions presented and thereby create a conflict with Jones, 527 U.S. 373. In her attempt to manufacture a conflict, Petitioner emphasizes and takes out of context a few sentences from the court's opinion. Petition p. 14.

As previously noted however, the court did not fault the trial court for failing to instruct on what occurs upon jury deadlock, but faulted the state court for "obscuring" the jury's ability to consider and give effect to mitigation without the unanimous approval of all jurors. Davis, at 689, Apx. 14a. Thus, the court concluded Respondent's acquittal first instructions present "an entirely different instruction from one that clearly informs the jurors that a life verdict can be rendered by a jury that has not first unanimously rejected the death penalty." Id.

Stated another way, the court did not reverse for failing to give the instruction, but merely noted that without such instruction and in the unique circumstances of Respondent's case, a reasonable jury would understand the instructions and verdict forms as denying the ability to give effect to mitigation unless and until, an acquittal of death.

In sum, in seeking certiorari, Petitioner has misstated and mischaracterized the legal basis of the court's opinion. Given this clear mischaracterization, Petitioner is thus asking this Court to review an issue that is not even presented by the judgment below. Because the questions posed by Petitioner are not presented in the record, the questions cannot be reviewed and the petition must be denied.

II. THIS COURT DOES NOT NEED TO REVIEW THE LOWER COURTS' APPLICATION OF SETTLED LEGAL PRINCIPLES TO THE UNIQUE INSTRUCTIONS AND VERDICT FORMS PROVIDED RESPONDENT'S JURY

The writ should also be denied because this case presents no compelling reason for review, as Petitioner merely requests that this Court review the Sixth Circuit's application of settled legal principles to the unique instructions and verdict forms provided to Petitioner's jury. Indeed, the court identified the governing legal standard, Boyde. Davis, 318 F.3d at 688, Apx. 12a. Applying, Boyde, the court examined whether the instructions in Respondent's case violated Mills. Davis, at 687-88, Apx. 10a-11a.

Indeed, Petitioner recognizes that Mills is the clearly established and applicable controlling authority. Petition p. 13 ("It is well-settled law that a State cannot require jurors during capital sentencing deliberations to consider only those mitigating factors that the jury unanimously finds are present. See Mills, 486 U.S. at 374-375; McCoy, 494 U.S. at 435.").[3] Petitioner also does not dispute the content of the instructions. With the facts and the law to be applied not in dispute, and with the lower court simply having applied those facts to the applicable law, it is clear that the writ should be denied because this Court is not in the business of conducting third-tier reviews of the same application of law to undisputed facts.

[3] This recognition of Mills contradicts in large measure Petitioner's allegations that the basis of the court's ruling is not "clearly established."

Authority cited by Petitioner demonstrates the unique and fact-intensive manner of this inquiry. For instance, given the unique instructions in Zettlemoyer v. Fulcomer, 923 F.3d 284 (3rd Cir. 1991),[4] the habeas petitioner could not state a claim for relief under Mills. Thereafter, given the unique instructions in Frey v. Fulcomer, 132 F.3d 916 (3d Cir. 1997), the habeas petitioner could state a claim for relief under Mills. A Mills error is not a "one size fits all error." It requires a reviewing court to apply the Boyde test to determine whether the instructions and verdict forms violate Mills. On a case-by-case basis, a reviewing court must faithfully apply Boyde to the instructions before it.[5] Thus, Boyde rebuts Petitioner's suggestion that Mills is a "one size fits all error;" rather, it reinforces that Petitioner simply disagrees with the court's result.

Petitioner, therefore, makes the unexceptional request that this Court grant certiorari to review properly stated, settled legal principles to the unique instructions and verdict forms of this case. Under such circumstances, certiorari is simply not warranted. See U.S.S.Ct.R. 10 (certiorari not warranted where lower court applied facts to properly stated rule of law); Kyles v. Whitley, 514 U.S. 419, 456 (1995)(Scalia, J., dissenting).

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[4] Petitioner alleges the instructions in Zettlemoyer are close to Respondent's case. This is not true. Zettlemoyer did not concern an instruction, as given Respondent's jury, that "since this is a criminal case the law requires that in order for you to reach a decision all 12 of you must be in agreement." Further, the state court in Zettlemoyer used "verdict" in its instructions. However, Respondent's jury was not instructed as to their "verdicts" but was instructed that any "decision," which would include whether mitigation existed, required the agreement of all 12 jurors (see Tr. 1885 lines 16-17, Apx. 103a; Tr. 1885 lines 20-25 – 1886 lines1-3, Apx. 104a.), *and* Respondent's jury received an acquittal first instruction. Tr. 1889 lines 13-18, Apx. 105a-106a. Applying Boyde, the Panel reasonably concluded that a reasonable jury would understand this combination of instructions to require all 12 jurors to agree as to the existence of mitigating evidence. Davis, at 689-692, Apx. 14a-17a. This demonstrates precisely why this issue is not amenable to cert. This Court is not a court of error and does not need to parse through and compare instructions in verdict forms from varying cases to determine if a federal court correctly resolved a claim.

[5] This makes a Mills claim similar to an ineffectiveness claim. In that, just because this Court found counsel ineffective in Wiggins v. Smith, ___ U.S. ___, 123 S. Ct. 2527(2003), will not necessarily lead to an exodus from death rows throughout the country. Wiggins simply reinforces the Strickland standard and a state court's obligation to faithfully apply such standard. It does not relieve any court, state or federal, of its obligation to apply the standard to each cases facts.

III. THE MILLS RULING IS CORRECT

While the petition should be denied because it seeks review of the lower courts' application of the law to the facts to unique instructions and verdict forms, the petition should also be denied because the judgment below is correct under Mills, 486 U.S. 367 and McCoy, 494 U.S. 433.

The trial court unequivocally stated that "you, the trial jury" was responsible for the decisions to be made during the penalty phase. Tr. 1888 line 1, Apx. 105a. "[Y]ou, the trial jury" must consider all evidence and determine whether the aggravating specifications found outweigh any mitigating factors "you find that are present in this case" Tr. 1888 line 11-12, Apx. 105a . This makes it absolutely clear that "you" is "the trial jury" not only as to this instruction, but as to all the penalty phase instructions as well. Consequently, the trial jury -- not individual jurors -- makes the two decisions (existence of mitigation and sentencing decision) at the penalty phase.

The jury was also instructed that "you are to decide whether it is a relevant factor of mitigation." Tr. 1885 lines 16-17, Apx. 103a. Immediately thereafter, this concept was reinforced "you will be called upon to decide the factual questions as to whether or not the defendant" has produced mitigation, that is "has the defendant met the burden of going forward with" mitigating evidence. Tr. 1885 lines 20-25 – 1886 lines1-3, Apx. 104a.

In short, the existence of mitigation therefore is a factual decision which "you, the jury" decide. In other words, a decision is made by all twelve jurors, not just one. This is later conclusively established when the court states "[n]ow, as you know, since this is a

criminal case the law requires that in order for you to reach a decision all twelve of you must be in agreement." Tr. 1892 lines18-21, Apx. 107a.

Further, the trial court improperly instructed Respondent's jurors that they could not give effect to the mitigation -- consider a life sentence -- until they had **first** acquitted, unanimously, Respondent of the potential death sentence. Tr. 1889 lines 13-18, Apx. 105a-106a. Until the unanimous acquittal on death, the jury could not **give effect to** any mitigating evidence.[6]

As a consequence of the above instructions, there is, at the very least, a reasonable likelihood that the jury would have understood that in making the factual findings of mitigation that they had to do so as a jury and unanimously. Further, the jury could not give effect to the mitigation – consider life options – until unanimously rejecting death. This violates the well-settled law that a State cannot require jurors during capital sentencing deliberations to consider only those mitigating factors that the jury unanimously finds are present. See Mills, 486 U.S. at 374-375; McCoy, 494 U.S. at 435.

Thus, the Sixth Circuit rightly concluded that the instructions would cause a reasonable jury to impose a unanimity requirement as to the existence of mitigation. Nothing about the panel's analysis is either incorrect or exceptional. The panel's conclusion in applying settled principles to the unique instructions and verdict forms herein was correct. Certiorari should be denied. See also U.S.S.Ct.R. 10.

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[6] This erroneous instruction mirrored comments made by the trial court to the prospective jurors during group voir dire. Specifically, the trial court informed the prospective jury panel, including all twelve of Respondent's jurors, that "[o]n the other hand, if you find that the aggravating circumstances do not outweigh the factors in mitigation beyond a reasonable doubt then you would be given the opportunity to impose a sentence of life imprisonment." Tr. 466, Circuit Jt. Apx. 126 (emphasis added).

IV. THERE IS NO INTERCIRCUIT OR INTRACIRCUIT CONFLICT

The writ should also be denied because, contrary to Petitioner's assertions, there is no conflict between the judgment below and the decision of any other federal court of appeals. See U.S.S.Ct.R. 10(a). Petitioner cites various cases to claim that the judgment below conflicts with judgments of other lower courts. All of the cases cited as supporting a purported conflict rely on the manufactured Jones conflict.

There is absolutely no conflict with Jones because the court below did not find constitutional error for the failure to instruct. Consequently, this Court must deny Petitioner's certiorari request.

Petitioner also claims that the Sixth Circuit's application of the law to the facts here is in conflict with other Sixth Circuit authority considering varying instructions. See Petition p. 21. Contrary to Petitioner's assertions, there simply is no conflict between the Court of Appeals' judgment and its prior judgments.

The court's decision is fully reconcilabe with the other circuit authority. For example, Scott v. Mitchell, 209 F.3d 854, 875 (6th Cir. 2000) ("this instruction plainly applies to the overall weighing of mitigating and aggravating factors"), noted that the instructions were not "acquittal first" instructions, but "consider first" instructions.[7] Indeed, the Sixth Circuit consistently recognizes "acquittal first" instructions are

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[7] The instructions given to Scott are not identical to those given Respondent's jury as noted by the court below:

> **that is, you must find that the state has failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant was found guilty of committing outweigh the mitigating factors.**
> In this event you will then proceed to determine which of the two possible life imprisonment sentences to recommend to the Court.

Davis, at 685, Apx. 5a (bold not given in Scott). Respondent's verdict forms, unlike Scott's, required the jury to make a unanimous finding acquitting of death before considering the life options. Davis, at 689-690, Apx. 14a-16a. Finally, Scott did not address any of the instructions Respondent presented to this Court in his third basis for not granting the writ. See pp. 10-11. This again underscores the factual uniqueness of Respondent's case.

constitutionally deficient under the Eighth Amendment. See Henderson v. Collins, 262 F.3d 615, 622 (6th Cir. 2001) ("reversal of a capital sentence is warranted"); Buell v. Mitchell, 274 F.3d 337, 355-56, n. 8 (6th Cir. 2001); Roe v. Baker, 316 F.3d 557 (6th Cir. 2002).

As found by the court, Respondent's jury was instructed "Death, but if you unanimously reject death, only then can you consider 30 to life or 20 to life." This is a far cry from the instructions in the other claimed conflict cases: "start with considering death, but also consider 30 to life or 20 to life." That being said the Petitioner's merit brief below correctly noted and **conceded** that there is no principle distinction between the "acquittal first" error and a violation of Mills. Petitioner's Sixth Circuit Final Brief pp. 25-26.

Finally, it should be noted that the named Petitioner herein has recognized this distinction. In McNeill v. Mitchell, Case No. 1:02 CV 1645 (N.D. Ohio) (Wells, J.)(pending), Petitioner noted the differences between "consider first" and "acquittal first" instructions. EFP Docket No. 40 at p. 109. This contradicts Petitioner's allegation herein.

This eviscerates Petitioner's suggestion of an intracircuit conflict. Again, a Mills error is not a "one size fits all error." A reviewing court must faithfully apply Boyde on a case-by-case basis to the instructions before it. Boyde denounces Petitioner's belief that there can never be a Mills violation in Ohio because the Sixth Circuit Court ruled in Scott that there was no Mills violation. Likewise, just because Respondent's unique instructions satisfied Mills will not lead to an exodus from Ohio's death row.

Even if an intracircuit conflict exists, which Respondent asserts one does not exist, this Court's certiorari jurisdiction is not properly invoked to resolve an intracircuit conflict, See Davis v. United States, 417 U.S. 333, 340 (1974), much a less an intra-circuit conflict which the lower court's members found so lacking in merit as no member of the court requested a vote. Therefore, the Court must deny the cert request.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

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Supreme Court, U.S.
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No. 03-151

In The Supreme Court Of The United States

BETTY MITCHELL, Warden,

Petitioner,

v.

WILEY DAVIS, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

As the Warden established in her Petition, this case offers the Court an ideal vehicle to clearly define the extent to which the Constitution requires a state trial judge to *affirmatively* instruct jurors on jury unanimity in capital sentencing—a vital, but unsettled, question of capital habeas jurisprudence. Rather than addressing the confusion that clouds this area of the law, however, Respondent presents two arguments—which amount to little more than a distilled recital of the panel majority's opinion—as to why this Court should decline to review the decision below. First, Respondent asserts that Petitioner is merely attempting to "manufacture . . . a conflict with *Jones*" *v. United States*, 527 U.S. 373 (1999), by "mischaracteriz[ing] . . . the legal issues considered by the Sixth Circuit." Resp. Br. at 6-7. In particular, Respondent argues that the decision below was a correct application of *Mills* and that "[t]here is absolutely no intercircuit or intracircuit conflict with *Jones* because the court below did not find constitutional error for the failure to instruct" the jury on unanimity. Resp. Br. at 12. Second, Respondent argues that the alleged uniqueness of the instructions and verdict forms at issue here also insulates the panel majority's decision from this Court's review. *Id.* at 8.

Respondent is wrong on both counts. Despite Respondent's repeated attempts to downplay it as unexceptional, the panel majority's decision below represents an unprecedented extension of this Court's decision in *Mills v. Maryland*, one that puts the Sixth Circuit in direct conflict with every other circuit that has considered that case. *Mills* simply holds that a State cannot require jurors to limit their consideration of mitigating factors to only those factors that they unanimously agree are present, an issue that, as Judge Boggs noted in dissent below, is "a far cry from the situation presented in this case." *Davis v. Mitchell*, 318 F.3d 682, 694 (6th Cir. 2003) (Boggs, J., dissenting). *See also Mills v Maryland*, 486 U.S. 367, 374-375 (1988). Relying on *Mills*, however, the panel majority overturned Respondent's capital

sentence, not because anything the trial judge actually said in the jury instructions violated *Mills*' prohibition, but rather because the majority believed that *Mills* required the trial judge to say more.

It is Respondent who, thus, "mischaracterizes" the panel majority's decision by repeatedly claiming "the court did not reverse for failing to give" certain instructions. Resp. Br. at 4, 5, 7, 12. Indeed, with the decision below, the Sixth Circuit now requires, on constitutional grounds, three new jury instructions in Ohio. That is, the Sixth Circuit tranformed the *prohibition* in *Mills* against certain capital sentencing schemes into an *obligation* for State trial court judges to affirmatively instruct capital jurors on jury unanimity. No other federal circuit, however, has read *Mills* to constitutionally require such jury instructions (and certainly no circuit has concluded the right to such instructions is "clearly established" for AEDPA purposes).

Respondent's assertion that "uniqueness" insulates the decision below from review is similarly flawed. Contrary to Respondent's claim, scores of prisoners in Ohio received their capital sentences based on jury instructions virtually indistinguishable from those used at Respondent's trial. The panel majority's idiosyncratic view of the Eighth Amendment thus threatens the constitutionality and finality of every one of these sentences. For these reasons—to ensure uniformity among the federal circuits on the Eighth Amendment requirements regarding unanimity instructions; to provide much-needed guidance on these vitally important and frequently recurring questions of capital habeas jurisprudence; and to prevent the Sixth Circuit's unwarranted constitutional interpretation from wrongly undermining scores of currently-imposed capital sentences—the Warden respectfully requests this Court's review.

Before further discussing these issues, however, the Warden would like to apologize to the Court for an inadvertent misstatement in the Petition. In relying on the federal district court's Factual Statement to construct her Statement of the Case, the Warden incorrectly stated that Respondent was sentenced to death for rape, murder and kidnapping.[1] In fact, he was sentenced "to death for [her] brutal kidnapping and murder." *Davis*, 318 F.3d at 685. Although immaterial to the questions presented in the Petition, Petitioner apologizes for incorrectly stating that Respondent was convicted of rape. This inadvertent factual misstatement, however, does nothing to minimize either the importance of the issues presented here, or the need for immediate review.

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[1] The federal district court's opinion on habeas stated the following:

On December 5, 1991, the Cuyahoga County Grand Jury indicted Davis on a six-count indictment. The first two counts charged aggravated murder under Ohio Revised Code § 2903.01(A) and (B). Each count carried three felony-murder capital specifications—kidnapping, aggravated robbery, and rape or attempted rape. The remaining counts charged kidnapping, rape, aggravated robbery, and having a weapon while under a disability. Davis was tried before the Cuyahoga County Court of Common Pleas. The jury convicted Davis on all counts and all specifications thereto. *** In 1995, the appellate court affirmed Davis's conviction .... In 1996, the Ohio Supreme Court affirmed both Davis's conviction and sentence. *Davis v. Mitchell*, 110 F. Supp.2d 607, 612-613 (N.D. Ohio 2000). App. 37a-38a.

ARGUMENT IN RESPONSE

I. By Improperly Extending The Holdings Of *Mills* And *McKoy*, The Panel Majority Below Created Both An Inter-Circuit And Intra-Circuit Conflict Regarding The Extent To Which A Judge Must Instruct The Jury On Unanimity In The Capital Sentencing Process.

Both the Warden and the Respondent agree "that *Mills* is the clearly established and applicable controlling authority" in this case. Resp. Br. at 8. As such, under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Respondent was entitled to federal habeas relief only if the state court decision was "contrary to" or "an unreasonable application of" *Mills*. 28 U.S.C. § 2254(d). AEDPA's standard is not in question here. Rather, what makes this case worthy of this Court's attention is that the panel majority below improperly extended *Mills*' reach—creating conflicts with its sister circuits and confusion within its own circuit—in determining that the state court's decision was "clearly 'opposite to that reached by [the Supreme] Court on a question of law' in the *Mills* and *McKoy* cases." *Davis*, 318 F.3d at 685 (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)).

As the Warden's Petition (and Judge Boggs below) observed, "'the Ohio Supreme Court's decision in upholding these instructions certainly does not constitute an unreasonable application of any clearly established precedent of [this Court],'" as *Mills* and *McKoy* have simply never been interpreted to require the instructions mandated by the decision below. Pet. at 11 (quoting *Davis*, 318 F.3d at 691 (Boggs, J., dissenting)). Rather than addressing this unprecedented extension of *Mills*, however, Respondent

merely asserts that the Warden "has misstated and mischaracterized the legal basis of the court's opinion." Resp. Br. at 8. Respondent is wrong.

Contrary to Respondent's assertion, the decision below cannot be characterized as the panel majority "merely applying" well-settled law from *Mills*. *See* Resp. Br. at 6. Neither party disputes that a State cannot require jurors to limit their consideration of mitigating factors during capital sentencing deliberations to those mitigating factors that the jury unanimously finds are present. *Mills*, 486 U.S. at 374-375; *McKoy v. North Carolina*, 494 U.S. 433, 435 (1990). The panel majority derived from these decisions, however, a substantially broader and more intrusive principle that requires state trial judges to *affirmatively instruct* jurors regarding certain aspects of unanimity in the capital sentencing process.

That is, where the federal circuits have uniformly read *Mills* and *McKoy* to create *prohibitions* on certain approaches to capital sentencing (*i.e.*, state trial judges *must not give* instructions prohibiting an individual juror from considering any mitigating factor that the juror finds to be present), the Sixth Circuit below instead improperly transformed those holdings into affirmative *obligations* (*i.e.*, state trial judges *must give* certain instructions regarding jury unanimity). Indeed, notwithstanding Respondent's suggestion that the court was merely applying well-settled law, the decision below in fact imposed no less than three new "affirmative obligations"—each one previously unrecognized by this Court or any other federal circuit.

Although Respondent claims, "the panel did not find constitutional error due to a failure to instruct" (Resp. Br. at 4), the plain language of the decision below belies that assertion. First, the panel opinion requires that the jury be *told* "*either expressly or impliedly*, that individual jurors may

consider mitigating circumstances in the weighing process regardless of the lack of agreement with other jurors as to the presence of that factor." *Davis*, 318 F.3d at 689-690. The only possible interpretation of this language, as Judge Boggs noted in dissent below, is that "silence in instructions on the lack of a unanimity requirement for mitigating circumstances violates the Eighth Amendment," a principle that he correctly notes can be found nowhere in either *Mills* or *McKoy*. *Id.* at 695. In electing to treat silence on jury unanimity as a constitutional violation, the Sixth Circuit has thus placed itself in direct conflict with a number of its sister circuits, *see* Pet. at 14-18, a conflict Respondent chooses to simply ignore.

Second, as Respondent himself notes, under the majority's approach, State trial judges *must "'clearly inform[] the jurors* that a life verdict can be rendered by a jury that has not first unanimously rejected the death penalty.'" Resp. Br. at 7 (quoting *Davis*, 318 F.3d at 689). But, as the dissent below notes, the majority's objection to the jury instructions on this issue "is not to the order of consideration, but to the possibility that a juror may be led to believe that the jury must first unanimously reject death before considering a life sentence, rather than allowing a single juror to prevent a death sentence by creating deadlock." *Id.* at 692 (Boggs, J., dissenting). The clear implication of the majority opinion is that a State trial judge must instruct that jury on how to proceed in the event it does not unanimously agree on a death sentence.

This newly created "affirmative obligation," however, directly contradicts this Court's mandate in *Jones v. United States*, which expressly held that State trial judges are not constitutionally required to instruct the jury as to the effect of failing to unanimously reach a verdict. *Jones*, 527 U.S. at 382. In fact, noting that it has never suggested "that the Eighth Amendment requires a jury to be instructed as to the

consequences of a breakdown in the deliberative process," the *Jones* Court chastised such instructions as encouraging deadlock and undermining the strong governmental interest in unanimous verdicts. *Id.* Because it directly contradicts this Court's *Jones* decision, while mischaracterizing the *Mills* holding in this regard, the panel majority's decision has created a conflict among the circuits regarding whether the trial judge must affirmatively instruct the jurors that they need not unanimously reject the death penalty before considering a life sentence. *See* Pet. at 20-21.

The third, and final, "affirmative obligation" stems from the panel majority's finding that "the *unqualified* instruction, 'Now as you know . . . the law requires that in order for you to reach a decision all 12 of you must be in agreement' would have led a reasonable jury to apply an unconstitutional standard of unanimity" at the sentencing phase. *Davis*, 318 F.3d at 690 (emphasis added). This language thus suggests that for the previous instruction to pass constitutional muster, the trial judge must "qualify" it, *i.e.*, affirmatively instruct the jurors that they need not unanimously conclude that the aggravating circumstances do not outweigh the mitigating circumstances in order to reject a death sentence. As the Warden explained in her Petition, however, the instruction at issue here did not require unanimity as to an "interim step in the deliberations"—which would violate the Constitution under *Mills*—but instead required it only as to the overall weighing process—which has been repeatedly held permissible. *See, e.g., Zettlemoyer v. Fulcomer*, 932 F.2d 284, 307-308 (3d Cir. 1991). In this respect, the panel majority's decision created yet another conflict among the federal circuits. *See* Pet. 22-23.

Respondent fails to address any of these three new "affirmative obligations," or explain how any of them is consistent with either Supreme Court precedent or decisions from the other circuits. Instead, he merely recites the mantra

that the panel majority properly applied *Mills*, and *Jones* is therefore not at issue. Resp. Br. at 6-7, 10. Mere repetition, however, does not make that true. As the Warden, Judge Boggs and the other circuits to consider the issue have concluded, *Mills* does not *mandate any* instructions on jury unanimity—it merely *prohibits* a certain capital sentencing scheme not at issue here. By using *Mills* to create an affirmative obligation, the Sixth Circuit has misread this Court's precedent, and created a direct conflict with its sister circuits and this Court's decision in *Jones*, thereby making a capital defendant's federal constitutional rights dependent on the "luck" of geography. Accordingly, the Warden respectfully requests this Court to grant certiorari and unify the federal circuits on this vitally important and frequently recurring aspect of capital habeas jurisprudence.

II. Respondent's Remaining Reason For Denying Review Cannot Obscure The Inter-Circuit Conflicts And Intra-Circuit Confusion The Decision Below Has Created.

Respondent's only remaining argument for denying review here—that the decision below turns upon his trial's "unique instructions and jury forms" (Resp. Br. at 8)—is similarly untenable. Contrary to Respondent's claim, the decision below does not turn on any "unique" aspects of his jury instructions. Indeed, nearly identical instructions as those given in this case have been repeatedly challenged in the Sixth Circuit, as well as other federal circuits, to no avail. *See* Pet. at 14-17, 20-21, 22-25. In fact, both the majority and the dissent in a separate Sixth Circuit case offered up Respondent's own jury instructions as a model of constitutionality—a result that makes the panel majority's decision all the more remarkable. *See Henderson v. Collins*, 262 F.3d 615, 622 (6th Cir. 2001).

More importantly, Ohio courts, as well as courts across the nation, routinely use jury instructions virtually indistinguishable from those at issue here. The Sixth Circuit's inconsistent treatment of these jury instructions, therefore, has created considerable confusion among the lower courts on this issue. *See, e.g., Taylor v. Mitchell*, Case No. 1:01CV601, 2003 U.S. Dist. Lexis 4383 at *56-65 (N.D. Ohio March 3, 2003) (App. 116a-213a); *Henderson v. Collins*, Case No. C-1-94-106 (S.D. Ohio July 10, 2003) (App. 109a-213a). A simple review of the jury instructions given in these, and hundreds of other, Ohio capital cases demonstrates that Respondent's claim that his "unique" jury instructions insulate the panel majority's decision from review is unfounded.

In short, the Sixth Circuit's decision below has created a disturbing conflict among the federal circuits on the extent to which a state trial judge must instruct capital jurors on jury unanimity in sentencing—a conflict that will continue to fester with every federal habeas decision. Moreover, the decision below has called into question the validity of nearly every previously imposed Ohio death sentence because, contrary to his assertion, jury instructions identical to those used in Respondent's case have been given time and time again in capital sentencing proceedings across Ohio. The Warden has not requested this Court's review to "correct a lower court error;" rather, she respectfully requests this Court to grant certiorari to unify the federal circuits on this important and frequently recurring aspect of capital habeas jurisprudence.

CONCLUSION

For the foregoing reasons, as well as those in her Petition, the Warden respectfully urges this Court to grant certiorari and reverse the decision below.

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